INDEX TO APPENDIX

Relevant Docket Entries.

Civ—1971—80 M. Russell Turley & 1
v. Louis J. Lefkowitz, et al.

DATE		PROCEEDINGS
Mar.	2	Filed Complaint & request for Three Judge District Court
	24	" Deft., Lefkowitz, Answer
	30	" Deft., Tutuska, Answer
Apr.	16	Motion by Deft., Dillon to dismiss complaint—submitted
June	8	Filed Decision & Order granting Deft., Dillon's motion to dismiss complaint as to him —Curtin, J
	10	" Pltfs' Affidavit of M. Russell Turley and Robert H. Stievater
	10	" Pltfs' Notice of Motion for an order impanelling a three-judge court and for summary judgment—ret. 7/2/71—*adj. 7/16/71**
	21	" Defts., Lefkowitz & Rockefeller, Notice of Motion & Motion for Summary Judgment—ret. 7/2/71—*adj. 7/16/71**
July	2	" Deft., B. John Tutuska, Notice of Motion & Motion for Summary Judgment —ret. 7/2/71—*Court informs attys., they will be notified if oral argument is necessary—adj. 7/16/71—**Return date for oral argument, if necessary. No appearances. All motions considered by the court to be submitted
Nov.	24	" Deft., Michael F. Dillon, Affidavit, Notice of Motion and Motion to Dismiss complaint—ret. 4/2/71
	24	" Pltfs'. Answering Affidavit

Relevant Docket Entries.

DATE		PROCEEDINGS
1971		
	24	" Decision & Order requesting that the US Court of Appeals, 2nd Circuit, convene a three-judge court—Curtin, J.
Dec.	2	" Order, w/attached Order of Designation of Judges, convening a three-judge panel on 1/10/72, etc.—Curtin, J
1972		
Jan.	10	" Deft., B. John Tutuska, Memorandum
	10	Three Judge Court convenes—Hon. Wilfred Feinberg, Hon. John O. Henderson, & Hon. John T. Curtin—Argument on motion by Pltfs. for judgment declaring Sec. 103-A & 103-B of New York General Municipal Law & Sections 2601 & 2602 of New York Public Authorities Law is violative of Pltfs. Fifth Amendment Rights & a Permanent Injunction against the operation of the above statutes—Decision reserved
May	1	Filed Decision & Order declaring Sections 103-a & 103-b of New York's General Municipal Law & Sections 2601 & 2602 of the New York Public Authorities Law unconstitutional and enjoining the Defts., from their further enforcement—three Judge Court (Feinberg, USCJ & Henderson & Curtin, DJ)
June	29	Filed Notice of Appeal of Defts. Lefkowitz and Rockefeller with affidavit of service (appeal to U.S. Sup. Ct.)
	30	" Notice of Appeal of Deft. Tutuska with affidavit of service (appeal to U.S. Sup. Ct.)
Feb.	26	Filed certified copy of order of U.S. Supreme Court noting probable jurisdiction

Complaint.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

CIV—1971-80

M. RUSSELL TURLEY
1030 E. River Road
Grand Island, New York

ROBERT H. STIEVATER
8347 Sisson Highway
Eden, New York

Plaintiffs

—VS—

LOUIS J. LEFKOWITZ
The Capitol
Albany, New York

NELSON A. ROCKEFELLER
The Capitol
Albany, New York

B. JOHN TUTUSKA
Erie County Office Building
Buffalo, New York

Michael F. Dillon
Erie County Hall
Buffalo, New York

Defendants

I

This is an action for declaratory judgment under the provisions of 28 USC § 2201, seeking to declare uncon-

stitutional the following New York State Statutes:

(1) Chapter 605, § 2 of the Laws of 1959, as amended by Chapter 94 of the Laws of 1960 and Chapter 1032, § 1 of the Laws of 1968 and Chapter 694, § 4 of the Laws of 1970, codified as General Municipal Law Article 4, § 103-a, and entitled "Ground for cancellation of contract by municipal corporations and fire districts."

(2) Chapter 605, § 2 of the Laws of 1959 as amended by Chapter 94 of the Laws of 1960, Chapter 606, § 3 of the Laws of 1960, Chapter 420, § 125 of the Laws of 1968, Chapter 1032, § 2 of the Laws of 1968, Chapter 694, § 5 of the Laws of 1970, codified as General Municipal Law, Article 5-a, § 103-b entitled "Disqualification to contract with municipal corporations and fire districts."

(3) Chapter 605, § 3 of the Laws of 1959 as amended by Chapter 606, § 5 of the Laws of 1960, Chapter 1032, § 4 of the Laws of 1968 and Chapter 694, § 7 of the Laws of 1970 codified as Public Authorities Law, title 3-A, § 2601 entitled "Ground for cancellation of contract by public authority."

(4) Chapter 605, § 3 of the Laws of 1959, as amended by Chapter 606, § 6 of the Laws of 1960, Chapter 420, § 211 of the Laws of 1968, Chapter 1032, § 5 of the Laws of 1968 and Chapter 694, § 8 of the Laws of 1970, codified as Public Authorities Law title 3-A, § 2602 entitled "Disqualification to contract with public authority."

That the above entitled statutes are set out in full in Exhibit "A" annexed hereto and made a part hereof. For brevity, said statutes will hereinafter be referred to as "General Municipal Law § 103-a, General Municipal Law

§ 103-b, Public Authorities Law § 2601 and Public Authorities Law § 2602."

This action is also brought for a permanent injunction restraining the enforcement, operation and execution of said statutes and any and all regulations or rules which may have been promulgated pursuant thereto.

This action is upon the ground that said statutes are unconstitutional under the Constitution of the United States of America and to enjoin the enforcement of said statutes against plaintiffs herein. The matter in controversy involves rights of value in excess of $10,000.00. Jurisdiction of the Court as asserted under 28 U.S.C. §§ 1331, 1343(3) and a hearing before the Three Judge Court is prayed for pursuant to the provisions of 28 U.S.C. § 2281.

II

A. The parties plaintiff are each residents of the County of Erie, and State of New York. Each plaintiff is a duly licensed architect under the laws of the State of Ney York and each have been employed and active in the field of architecture for various municipalities and state and county agencies in the State of New York for many years past and each have reasonable expectation of employment by the State of New York and county agencies within the State of New York as architects in the future.

III

A. Defendant, Louis J. Lefkowitz, is now, and at all times material hereto has been, a resident of the State of New York and is Attorney General of the State of New York; and is the principal executive officer in charge of the enforcement of the Laws of the State of New York

including specifically General Municipal Law § 103-a, General Municipal Law § 103-b; Public Authorities Law § 2602 and Public Authorities Law § 2601, the statutes annexed hereto as Exhibit "A".

B. The defendant, Nelson A. Rockefeller, is the Governor of the State of New York with the general powers of that office including the power to direct the activities of the Attorney General as aforesaid.

C. The defendant, B. John Tutuska, is the County Executive of the County of Erie, a resident of the County of Erie and has the general powers of that office including the power to interfere with various contracts involving plaintiffs or firms in which plaintiffs are interested.

D. The defendant, Mchael F. Dillon, is a resident of the County of Erie and is the District Attorney of the County of Erie conducting Grand Jury proceedings within that County and as such officer of the State of New York is charged under the statutes above referred to with the duty of notifying various state, county and municipal bodies of a refusal to sign a waiver of immunity as more fully discussed hereinafter.

IV

A. That heretofore plaintiffs were served with subpoenas by defendant, Michael F. Dillon, to appear before a certain Grand Jury at the Erie County Hall, Buffalo, New York, on or about February 8, 1971 in a proceeding entitled "The People of the State of New York—against—John Doe, et al."

B. That upon appearing at the office of the District Attorney of Erie County on February 8, 1971, and before

being called before said Grand Jury, each of the above named plaintiffs was presented with "Waivers of Immunity," in the form as shown by Exhibits "B" and "C" annexed hereto and made a part hereof.

C. That, as appears from said Exhibits, the Grand Jury of the County of Erie, then in session, was investigating various charges of conspiracy, bribery and larceny and "other matters of every nature whatsoever appertaining thereto." The State of New York Penal Law sections referred to in said "Waiver of Immunity" are set forth in full in Exhibit "D" annexed hereto and made a part hereof.

D. After request of Assistant District Attorney of Erie County, John J. Honan, that the plaintiffs sign such "Waivers of Immunity", each plaintiff then and there declined to sign such waivers under the rights granted to them under Amendments V and XIV, Section 1 of the United States Constitution, that, as a direct consequence of the execution of such Waiver of Immunity, plaintiffs would be deemed to have waived their right not to be compelled in a criminal case to be a witness against themselves.

E. Thereafter, defendant, Michael F. Dillon, District Attorney of Erie County, has, upon information and belief, caused to be delivered various letters and other communications to the County of Erie, State of New York, Attorney General of the State of New York and various other State, County and municipal agencies in the State of New York with the intent of enforcement of General Municipal Law §§ 103-a, 103-b, Public Authorities Law § 2601 and Public Authorities Law § 2602.

V

A. That defendant, B. John Tutuska, as County Executive of the County of Erie may threaten to cancel or ter-

minate various contracts between the County of Erie and the partnership of which plaintiffs were members on the grounds of General Municipal Law § 103-a.

B. That the plaintiffs desire to seek employment by the State of New York, County of Erie and various other municipalities as architects and to enter into contracts with the State of New York, County of Erie and various municipalities in their capacities as architects or as members of a firm of architects and engineers or as directors or officers of a professional corporation of architects and engineers and are or may be prevented from doing so without violating the provisions of General Municipal Law § 103-b and Public Authorities Law § 2602 prohibiting such employment or contracts for a period of five years after the date of refusal to sign a Waiver of Immunity or, in this case, five years from February 8, 1971. By reason thereof, plaintiffs are irreparably damaged each in a sum in excess of Ten Thousand Dollars.

VI

A. The aforesaid statutes, General Municipal Law § 103-a, General Municipal Law § 103-a, Public Authorities Law § 2601 and Public Authorities Law § 2602, attached as Exhibit "A" are unconstitutional under the Constitution of the United States in that they tend to compel plaintiffs and other members of the public to be witnesses against themselves in criminal proceedings before grand juries.

Therefore, the individual plaintiffs and all those similarly situated who may be called before such grand jury proceedings are deprived of the protection granted them under Amendment V of the United States Constitution relating to self-incrimination in a criminal proceeding.

VII

A. The defendants and each of them, by reason of the aforesaid statutes, General Municipal Law § 103-a, General Municipal Law § 103-b, Public Authorities Law § 2601 and Public Authorities Law § 2602, threaten to nullify the contractual rights of the individual plaintiffs and a partnership of which they are now members; furthermore, by reason of said statutes, said defendants threaten to impose severe penalties and sanctions against plaintiffs if they attempt to submit bids or receive awards or enter into any contracts with the State of New York or any political subdivision thereof.

VIII

A. The plaintiffs, being threatened with loss of federally guaranteed rights except upon severe penalties of fines and civil suits, have no adequate remedy at law, and unless this Court grants relief as prayed, will be deprived of their lawful rights for an indefinite period of time.

WHEREFORE, it is prayed that:

1. A Three Judge District Court be convened to hear and determine this cause pursuant to the authority and requirement of 28 USC § 2281 and 2284;

2. That General Municipal Law § 103-a, General Municipal Law § 103-b, Public Authorities Law § 2601 and Public Authorities Law § 2602, all statutes of the State of New York, attached hereto as Exhibit "A" be declared unconstitutional and null and void;

3. That the defendants, their successors in office and all persons acting as their agents, officers, and servants or under their direction or authority, be permanently en-

joined and restrained from taking any action to enforce said statutes or any regulations promulgated thereunder;

4. For such other and further relief as the Court may deem proper.

ROBINSON & SPELLER
Attorneys for Plaintiffs

By: RICHARD O. ROBINSON
Richard O. Robinson
Office & P.O. Address
606 Liberty Bank Building
Buffalo, New York 14202

Exhibit A.

GENERAL MUNICIPAL LAW

Section 103-a. Ground for cancellation of contract by municipal corporations and fire districts:

A clause shall be inserted in all specifications or contracts made or awarded by a municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or by a fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, for work or services performed or to be performed, or goods sold or to be sold, to provide that upon the refusal of a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any

transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation, or fire district, or any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or with any fire district or any agency or official thereof on or after the first day of Septemer, nineteen hundred sixty, by such person, and by any firm, partnership, or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the municipal corporation or fire district without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the municipal corporation or fire district for goods delivered or work done prior to the cancellation or termination shall be paid.

The provisions of this section as in force and effect prior to the first day of September, nineteen hundred sixty, shall apply to specifications or contracts made or awarded by a municipal corporation on or after the first day of July, nineteen hundred fifty-nine, but prior to the first day of September, nineteen hundred sixty.

Exhibit A.

Section 103-b. Disqualification to contract with municipal corporations and fire districts:

Any person, who, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership, or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so refusing and any firm, partner-

ship or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

Public Authorities Law

Article 9—General Provisions

(Title 3-A—Contracts of Public Authorities

Section 2601. Ground for cancellation of contract by public authority:

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority or by any official of any public authority created by the state or any political subdivision, for work or services performed or to be performed or goods sold or to be sold, to provide that upon the refusal by a person, when called before a grand jury, head of a state department, temporary

state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any public authority or official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the public authority for goods delivered or work done prior to the cancellation or termination shall be paid.

Section 2602. Disqualification to contract with public authority:

Any person who, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of

witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director, or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York, or the commissioner of general services as the case may be, and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing any any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of

this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

Exhibit B.

COUNTY COURT,

ERIE COUNTY.

Pre-Indictment No. 36,369

THE PEOPLE OF THE STATE OF NEW YORK

against

JOHN DOE, et al

I have been advised by Assistant District Attorney JOHN J. HONAN that the Grand Jury of the County of Erie, now in session, is investigating a charge of Conspiracy (Sections 105.00, 105.05, 105.10, 105.15 of the Penal Law); Bribery

Exhibit B.

(Sections 200, 200.10, 200.20, 200.25, 200.30, 200.35 200.45, 200.50 of the Penal Law); Larceny (Article 155 of the Penal Law), and other matters of every nature whatsoever appertaining thereto. I am further advised that such charge and investigation may involve me.

I have also been advised by Mr. John J. Honan that I need not appear or give evidence before said Grand Jury concerning the aforesaid matters unless I wish to do so; that I am entitled to consult counsel and that if I do testify before said Grand Jury, any testimony given by me must be voluntary on my part.

No one has made any threats or promises to me whatsoever in connection with my appearance or any testimony that I may give before the Grand Jury. I have also been advised by Mr. JOHN J. HONAN that anything I may say or testify to before said Grand Jury in said investigation can be used against me on the prosecution of any charge or indictment concerning the transactions about which I may testify.

And, with full understanding of my declarations herein, and of my own free will, I hereby expressly waive any immunity that might otherwise come to me because or on account of my appearance or any testimony that I may give before said Grand Jury in connection with said investigation.

ROBERT H. STIEVATER

Dated: Buffalo, N.Y., the 8th day of February, 1971.
(Acknowledged, February 8, 1971.)

Exhibit C.

COUNTY COURT,

ERIE COUNTY.

Pre-Indictment No. 36,369

THE PEOPLE OF THE STATE OF NEW YORK

against

JOHN DOE, et al

I have been advised by Assistant District Attorney, JOHN J. HONAN that the Grand Jury of the County of Erie, now in session, is investigating charges of Conspiracy (Sections 105.00, 105.05, 105.10, 105.15, of the Penal Law); Bribery (Sections 200, 200.10, 200.20, 200.25, 200.30, 200.35, 200.45, 200.50 of the Penal Law); Larceny (Article 155 of the Penal Law), and other matters of every nature whatsoever appertaining thereto. I am further advised that such charge and investigation may involve me.

I have also been advised by Mr. JOHN J. HONAN that I need not appear or give evidence before said Grand Jury concerning the aforesaid matters unless I wish to do so; that I am entitled to consult counsel and that if I do testify before said Grand Jury, any testimony given by me must be voluntary on my part.

No one has made any threats or promises to me whatsoever in connection with my appearance or any testimony that I may give before the Grand Jury. I have also been advised by Mr. JOHN J. HONAN that anything I may say or testify to before said Grand Jury in said investigation can be used against me on the prosecution of any charge or in-

dictment concerning the transactions about which I may testify.

And, with full understanding of my declarations herein, and of my own free will, I hereby expressly waive any immunity that might otherwise come to me because or on account of my appearance or any testimony that I may give before said Grand Jury in connection with said investigation.

M. RUSSELL TURLEY

Dated: Buffalo, N.Y., the 8th day of February, 1971.

(Acknowledged, February 8, 1971.)

Exhibit D.

PENAL LAW

Section 105.00—Conspiracy in the fourth degree:

A person is guilty of conspiracy in the fourth degree when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or causes the performance of such conduct.

Conspiracy in the fourth degree is a class B misdemeanor. • • •

Section 105.05—Conspiracy in the third degree:

A person is guilty of conspiracy in the third degree when, with intent that conduct constituting a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the third degree is a class A misdemeanor. • • •

Exhibit D.

Section 105.10—Conspiracy in the second degree:

A person is guilty of conspiracy in the second degree when, with intent that conduct constituting a class B or class C felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the second degree is a class E felony. • • •

Section 105.15—Conspiracy in the first degree:

A person is guilty of conspiracy in the first degree when, with intent that conduct constituting murder or kidnapping in the first degree be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the first degree is a class C Felony. • • •

Section 200.00—Bribery

A person is guilty of bribery when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

Bribery is a class D felony. • • •

Section 200.10—Bribe receiving:

A public servant is guilty of bribe receiving when he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that his vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

Bribe receiving is a class D felony. • • •

Exhibit D.

Section 200.20—Rewarding official misconduct:

A person is guilty of rewarding official misconduct when he knowingly confers, or offers or agrees to confer, any benefit upon a public servant for having violated his duty as a public servant.

Rewarding official misconduct is a class E felony. • • •

Section 200.25—Receiving reward for official misconduct:

A public servant is guilty of receiving reward for official misconduct when he solicits, accepts or agrees to accept any benefit from another person for having violated his duty as a public servant.

Receiving reward for official misconduct is a class E felony. • • •

Section 200.30—Giving unlawful gratuities:

A person is guilty of giving unlawful gratuities when he knowingly confers, or offers or agrees to confer, any benefit upon a public servant for having engaged in official conduct which he was required or authorized to perform, and for which he was not entitled to any special or additional compensation.

Giving unlawful gratuities is a class A misdemeanor. • • •

Section 200.35—Receiving unlawful gratuities:

A public servant is guilty of receiving unlawful gratuities when he solicits, accepts or agrees to accept any benefit for having engaged in official conduct which he was required or authorized to perform, and for which he was not entitled to any special or additional compensation.

Receiving unlawful gratuities is a class A misdemeanor. • • •

Exhibit D.

Section 200.45—Bribe giving for public office:

A person is guilty of bribe giving for public office when he confers, or offers or agrees to confer, any money or other property upon a public servant or a party officer upon an agreement or understanding that some person will or may be appointed to a public office or designated or nominated as a candidate for public office.

Bribe giving for public office is a class D felony. * * *

Section 200.50—Bribe receiving for public office:

A public servant or a party officer is guilty of bribe receiving for public office when he solicits, accepts or agrees to accept any money or other property from another person upon an agreement or understanding that some person will or may be appointed to a public office or designated or nominated as a candidate for public office.

Bribe receiving for public office is a class D felony. * * *

Article 155.—Larceny; definitions of terms:

The following definitions are applicable to this title:

1. "Property" means any money, personal property, real property, thing in action, evidence of debt or contract, or any article, substance or thing of value.

2. "Obtain" includes, but is not limited to, the bringing about of a transfer or purported transfer of property or of a legal interest therein, whether to the obtainer or another.

3. "Deprive." To "deprive" another of property means (a) to withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in

such manner or under such circumstances as to render it unlikely that an owner will recover such property.

4. "Appropriate." To "appropriate" property of another to oneself or a third person means (a) to exercise control over it, or to aid a third person to exercise control over it, permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit, or (b) to dispose of the property for the benefit of oneself or a third person.

5. "Owner." When property is taken, obtained or withheld by one person from another person, an "owner" thereof, means any person who has a right to possession thereof superior to that of the taker, obtainer or withholder.

A person who has obtained possession of property by theft or other illegal means shall be deemed to have a right of possession superior to that of a person who takes, obtains or withholds it from him by larcenous means.

A joint or common owner of property shall not be deemed to have a right of possession thereto superior to that of any other joint or common owner thereof.

In the absence of a specific agreement to the contrary, a person in lawful possession of property shall be deemed to have a right of possession superior to that of a person having only a security interest therein, even if legal title lies with the holder of the security interest pursuant to a conditional sale contract or other security agreement.

6. "Secret scientific material" means a sample, culture, micro-organism, specimen, record, recording, document, drawing or any other article, material, device or substance which constitutes, represents, evidences, reflects, or records a scientific or technical process, invention or formula or any

part or phase thereof, and which is not, and is not intended to be, available to anyone other than the person or persons rightfully in possession thereof or selected persons having access thereto with his or their consent, and when it accords or may accord such rightful possessors an advantage over competitors or other persons who do not have knowledge or the benefit thereof. • • •

7. "Credit card" means any instrument or article defined as a credit card in section five hundred eleven of the general business law.

8. "Service" includes, but is not limited to, labor, professional service, transportation service, the supplying of hotel accommodations, restaurant services, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam and water. A ticket or equivalent instrument which evidences a right to receive a service is not in itself service but constitutes property within the meaning of subdivision one. • • •

Lefkowitz Answer.

[SAME TITLE]

ANSWER TO COMPLAINT

Defendant Louis J. Lefkowitz, *pro se,* and defendant Nelson A. Rockefeller, by his attorney, Louis J. Lefkowitz, Attorney General of the State of New York, answering the complaint herein:

1. Admit the allegations contained in paragraph numbered "I" and "III".

2. Deny the allegations contained in paragraphs numbered "VI" and "VIII".

3. Deny information sufficient to form a belief as to the allegations contained in paragraphs numbered "II", "V" and "VII".

4. Admit all of paragraph numbered "IV", except deny that part in "D" which reads "that, as a direct consequence of the execution of such Waiver of Immunity, plaintiffs would be deemed to have waived their right not to be compelled in a criminal case to be a witness against themselves".

FIRST DEFENSE

5. The Court lacks jurisdiction of the subject matter of the action.

SECOND DEFENSE

6. The complaint fails to state a claim against defendants upon which relief can be granted.

WHEREFORE, defendants demand that the complaint herein be dismissed together with the costs and disbursements of this action.

DATED: Albany, New York
March 22, 1971

Signed:

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State
Defendants

By s/ DOUGLAS S. DALES, JR.
DOUGLAS S. DALES, JR.
Assistant Attorney General

Tutuska Answer.

Defendant, B. John Tutuska, by his attorney, Robert E. Casey, Jr., County Attorney for the County of Erie, answering the complaint herein:

FIRST: Admits the allegations contained in paragraphs numbered "I", "III", "IV-E." and "V-A.".

SECOND: Denies the allegations contained in paragraphs numbered "VI" and "VIII".

THIRD: Denies information sufficient to form a belief as to the allegations contained in paragraphs numbered "II", "IV" and "V".

FOURTH: Admits the allegation of paragraph numbered "VII" which states that the defendant threatens to nullify the contractual rights of the individual plaintiffs and a partnership of which they are now members and denies each and every other allegation contained therein.

FIRST DEFENSE

FIFTH: The Court lacks jurisdiction of the subject matter of the action.

SECOND DEFENSE

SIXTH: The complaint fails to state a claim against defendants upon which relief can be granted.

WHEREFORE, defendants demand that the complaint herein be dismissed together with the costs and disbursements of this action.

Dated: Buffalo, New York
March 29, 1971

Signed:

ROBERT E. CASEY, JR.
County Attorney for the County of Erie, and Attorney for the Defendant, B. John Tutuska

By: /s/ JUSTYN E. MILLER
Justyn E. Miller
Assistant County Attorney

Dillon Motion to Dismiss.

PLEASE TAKE NOTICE, that upon the complaint herein, the undersigned will move this Court, in the United States Court House, City of Buffalo, New York, on the 2nd day of April, 1971, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the Complaint herein, on the ground that the same fails to state a claim against the defendant Michael F. Dillon, upon which relief can be granted.

Dated: Buffalo, New York
March 26th, 1971

Yours, etc.

MICHAEL F. DILLON
District Attorney of Erie County

PETER J. NOTARO
Assistant District Attorney
Chief, Appeals Bureau, Of Counsel

To:

RICHARD O. ROBINSON, Esq.
Attorney for Plaintiffs

Motion to Dismiss Complaint.

To the Hon. John T. Curtin, Judge of the United States District Court for the Western District of New York:

The defendant Michael F. Dillon moves this Court under Rule 12(b)(6), Rules of Civil Procedure, to dismiss the action as to the defendant Michael F. Dillon because the Complaint fails to state a claim against said defendant upon which relief can be granted, as more particularly appears from the affidavit attached hereto.

Dated: Buffalo, New York
March 26th, 1971

Yours, etc.

Michael F. Dillon
District Attorney of Erie County

Peter J. Notaro
Assistant District Attorney
Chief, Appeals Bureau, Of Counsel
200 Erie County Hall
25 Delaware Avenue
Buffalo, New York 14202

To: Richard O. Robinson, Esq.
Attorney for Plaintiffs
606 Liberty Bank Building
Buffalo, New York 14202

Affidavit of Michael F. Dillon, in Support of Motion.

MICHAEL F. DILLON, being duly sworn, deposes and says:

That he is the defendant in the above entitled action.

That the said proceeding arises out of the fact that the plaintiffs herein, while under contract with the County of Erie, were subpoenaed to testify before an Erie County Grand Jury on or about February 8th, 1971.

That plaintiffs herein, on or about February 8th, 1971, were offered Waivers of Immunity forms to execute and that they refused to do so on or about said date.

That as a result of their refusal to sign Waivers of Immunity, your deponent was compelled by virtue of Section 103-b of the General Municipal Law of the State of New York to notify the Commissioner of Transportation of the State of New York and others of such refusals.

The plaintiffs now seek in their Complaint declaratory judgment ruling upon the constitutionality of the aforementioned Section of the General Municipal Law of the State of New York as well as other sections. They also seek in their Complaint to permanently enjoin the enforcement, operation and execution of the statutes and regulations or rules which have been promulgated pursuant to those statutes.

It is the position of the defendant Michael F. Dillon that the aforesaid notification to the Commissioner of Transportation of the State of New York and others is the sum and substance of any duties imposed upon him attendant to the plaintiffs' refusals, and in view of this there is nothing further that the Laws of the State of New York allow your deponent to do insofar as the enforcement of any of the statutes which pertain to said refusals.

That, therefore, this Court is being asked by the plaintiffs to permanently enjoin your deponent from participating in actions which the law specifically does not allow your deponent to participate in, that is the enforcement, opera-

tion and execution of the various statutes set forth in the Complaint.

WHEREFORE, your deponent respectfully prays for an order dismissing the Complaint herein as against the defendant Michael F. Dillon, on the basis that the Complaint does not state a claim against the defendant Michael F. Dillon, upon which relief can be granted.

(Sworn to by Michael F. Dillon, March, 26, 1971.)

Affirmation of Richard O. Robinson, in Opposition to Dillon Motion.

RICHARD O. ROBINSON, affirms and states:

1. That he is an attorney at law and is of counsel for the plaintiffs in the above entitled action.

2. That this motion has been brought by the District Attorney of Erie County to dismiss the action as to him on the grounds that the question of notification of political subdivisions is moot.

3. Section 103-b of the General Municipal Law states, in part, as follows:

• • •

"It shall be the duty of the officer conducting the investigation before the Grand Jury before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer, or director, to the Superintendent of Public Works of the State of New York and the

appropriate departments, agencies and officials of the State, political subdivisions thereof or public authorities with whom the person so refusing, and any firm, partnership, or corporation of which he is a member, partner, director or officer, is known to have a contract."

4. Upon information and belief, the source of deponent's information being a copy of a letter from District Attorney Michael F. Dillon to various persons and bodies, a notice of the refusal of M. Russell Turley and Robert H. Stievater to give testimony before a Grand Jury was sent to the following persons:

Louis J. Lefkowitz, Attorney General, State Capital, Albany, New York.

Commissioner of Transportation of the State of New York

Hon. B. John Tutuska, Erie County Executive, 95 Franklin Street, Buffalo, N. Y.

Hon. Robert E. Casey, Jr., Erie County Attorney, 25 Delaware Avenue, Buffalo, N. Y.

Erie County Legislature, 25 Delaware Avenue, Buffalo, New York.

Turley, Stievater, Walker, Mauri and Assoc., 807 Elmwood Avenue, Buffalo, New York.

5. Therefore, in fact, no notice has been sent to the Superintendent of Public Works of the State of New York and, to the direct knowledge of deponent, notices have not been forwarded to certain political subdivisions with whom the firm of Turley, Stievater, Walker, Mauri and Associates has been acting.

6. In view of the circumstances of this motion, however, deponent respectfully requests that an order be entered, pendente lite, restraining Michael F. Dillon, District Attorney of Erie County, from sending out further and additional notices in regard to the matters concerned in this action.

Affirmed to be true pursuant to the penalties of perjury this 5th day of April, 1971.

RICHARD O. ROBINSON

Decision and Order Granting Dillon Motion to Dismiss.

APPEARANCES: Robinson & Speller (Richard O. Robinson, of counsel), Buffalo, New York, for the Plaintiffs.

Michael F. Dillon, District Attorney of Erie County (Peter J. Notaro, of Counsel), Buffalo, New York, for Defendant Dillon.

Plaintiffs have brought an action seeking a judgment declaring Sections 103-a and 103-b of the New York General Municipal Law and Sections 2601 and 2602 of the New York Public Authorities Law unconstitutional. Since plaintiffs further seek a permanent injunction against the enforcement of the above statutes, they have applied for the convening of a three-judge court pursuant to Title 28, United States Code, Sections 2281 and 2284.

By motion pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, defendant Dillon requests that the action be dismissed as to him on the ground of mootness.

To rule on this motion, a brief review of the facts, as alleged by plaintiffs, is necessary. Plaintiffs are licensed

architects employed in the past by various New York municipalities and state and county agencies. On February 8, 1971, plaintiffs refused to sign waivers of immunity upon being called to testify before a grand jury conducted by defendant Dillon. As required by Section 103-b of the New York General Municipal Law and Section 2602 of the New York Public Authority Law, defendant Dillon immediately notified the Commissioner of Transportation of the State of New York and others of plaintiffs' refusal.

Having completed his obligations under the above statutes, defendant Dillon argues the plaintiffs' action is moot as to him. Plaintiffs counter that defendant Dillon is also required by the above cited state statutes to notify the Superintendent of Public Works of the State of New York, that he has not done so, and therefore the action is not moot. Moreover, plaintiffs argue, defendant Dillon has not yet sent notices to certain political subdivisions with whom plaintiffs' firm is engaged.

In 1968, the New York Legislature amended the notification provisions of Sections 103-b and 2602 by substituting "commissioner of transportation" for "superintendent of public works." See Laws of New York, Chapter 420, Section 125 (1968). Plaintiffs' first point is therefore clearly wrong.

Both in his motion papers and in oral argument before this court, defendant Dillon has represented that he has completed his ministerial notification obligations and that he will take no further action in this respect. Accordingly, plaintiffs' second point is also without merit.

The motion of defendant Dillon is granted.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: June 8, 1971.

Motion for Three-Judge Court and Summary Judgment.

SIRS:

PLEASE TAKE NOTICE that upon the affidavits of M. Russell Turley and Robert H. Stievater, duly sworn to and upon the pleadings and proceedings heretofore had herein, a motion will be made at a term of the United States District Court for the Western District of New York at Part II, sixth floor of the U.S. Courthouse, Buffalo, New York, on the 2nd day of July, 1971 at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order impanelling a three-judge court pursuant to Section 2284 of Title 28 of the United States Code and for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and for such other and further relief as to the Court may seem proper under the circumstances.

Yours, etc.,

ROBINSON & SPELLER
Attorneys for Plaintiffs

To:

MICHAEL F. DILLON
District Attorney of Erie County

PETER J. NOTARO
Assistant District Attorney
Chief, Appeals Bureau, of Counsel

ROBERT E. CASEY, JR.
County Attorney for the County
of Erie and Attorney for the
Defendant B. John Tutuska

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State Defendants

Turley and Stievater Affidavits.

STATE OF NEW YORK
COUNTY OF ERIE
CITY OF BUFFALO
} SS.:

M. RUSSELL TURLEY and ROBERT H. STIEVATER, each being duly and severally sworn, depose and say:

1. That they are the plaintiffs in the above entitled action and are each architects duly licensed to practice their profession in the State of New York.

2. That on February 8, 1971, pursuant to subpoena, they each appeared at the office of John J. Honan, Assistant District Attorney for the County of Erie, New York, and were presented with forms of "Waiver of Immunity" as shown in Exhibits "A" and "B" annexed hereto and made a part hereof.

3. That they each then and there refused to sign such Waiver of Immunity.

4. Thereafter, upon information and belief, on February 9, 1971, the District Attorney of Erie County, Michael F. Dillon, caused to be forwarded to the Attorney General of the State of New York, the Erie County Executive and various other parties notifying such parties of the refusal of deponents to execute a Waiver of Immunity to testify before a Grand Jury.

5. That deponents are presently members of a partnership which has contracts with certain municipalities. These contracts are subject to cancellation should such municipalities be notified of deponents' refusal to execute

a Waiver of Immunity, pursuant to the provisions of the General Municipal Law of the State of New York.

6. In the pursuit of their architectural profession in the past, each of the deponents and firms with which they have been associated have sought out contracts with various municipalities and agencies and desire to do so in the future in order to continue in the active practice of their profession. They are prevented from doing so, however, by reason of the so-called disqualification provisions of Section 103-b of the General Municipal Law.

7. Further, upon information and belief, even if deponents should attempt to secure employment from a municipal body or governmental subdivision, said Section 103-b of the General Municipal Law of the State of New York will have the effect of preventing the employment of deponents.

8. That, upon information and belief, the defendant, B. John Tutuska, the Erie County Executive, has, or is about to, cancel a certain contract between a firm in which deponents are associated and the County of Erie relating to the architectural design of a dome stadium in the County of Erie.

9. It is submitted that by reason of the foregoing, the various statutes cited in the complaint herein and the actions taken, or which are about to be taken, by the District Attorney of Erie County and the Erie County Executive, B. John Tutuska, are punitive in nature punishing deponents for the exercise of their constitutional rights under the Fifth Amendment of the United States Constitution.

10. That no previous application has been made for this or similar relief herein.

WHEREFORE, dependents pray:

(a) That a three-judge district court be convened to hear and determine this cause;

(b) That said three-judge district court grant summary judgment to plaintiffs herein: (1) Declaring General Municipal Law, Section 103-a, General Municipal Law Section 103-b, Public Authorities Law, Section 2601 and Public Authorities Law, Section 2602, all statutes of the State of New York, unconstitutional and null and void; and (2) Enjoining and restraining the defendants herein from taking any action to enforce said statutes or any regulations promulgated thereunder; and for such other and further relief as such Court may deem proper under the circumstances.

(Sworn to by M. Russell Turley and Robert H. Stievater, May 26, 1971.)

Letter, Annexed to Foregoing Affidavit.

OFFICE OF THE
DISTRICT ATTORNEY
Erie County Hall
Buffalo, N. Y. 14202

MICHAEL F. DILLON
District Attorney

JOHN J. HONAN
First Assistant

February 9, 1971.

Hon. Louis J. Lefkowitz, Attorney General, State Capital, Albany, N.Y.

Commissioner of Transportation of the State of New York

Hon. B. John Tutuska, Erie County Executive, 95 Franklin St. Buffalo.

Hon. Robert E. Casey, Jr. Erie County Attorney, 25 Delaware Avenue, Bflo.

Erie County Legislature, 25 Delaware Avenue, Buffalo, N.Y.

Turley, Stievater, Walker, Mauri & Associates, 807 Elmwood Avenue, Bflo.

Gentlemen:

Please be advised that the following persons were subpoenaed to appear before the January, 1971 Hold-over Erie County Grand Jury to testify with regard to an investigation concerning transactions and contracts that they had with the County of Erie, a political subdivision of the State of New York:

J. Lloyd Walker
M. Russell Turley
Robert H. Stievater

Letter, Annexed to Foregoing Affidavit.

Pursuant to said subpoenas they were individually asked to sign a Waiver of Immunity against subsequent criminal prosecution and each refused. Mr. Walker was nonetheless called before the Grand Jury and has testified with immunity. Mr. Turley and Mr. Stievater, upon their respective refusals to sign such a waiver, were excused and have not been called before the Grand Jury.

Your attention is called to Article 5-A pertaining to Public contracts as recited in the General Municipal Law, and more specifically, Sections 103-A and 103-B, pertaining to cancellations of existing contracts and disqualifications of future contracts and awards with any political subdivision of the State of New York.

This letter is written to you pursuant to the direction contained in the law as the District Attorney conducting the investigation before the Grand Jury.

Very truly yours,

MICHAEL F. DILLON
District Attorney

MFD:ES

Registered mail-return receipt requested.

Exhibit A, Waiver of Immunity, Annexed to Foregoing Affidavit.

COUNTY COURT, ERIE COUNTY

Pre-Indictment No. 36,369

THE PEOPLE OF THE STATE OF NEW YORK

against

JOHN DOE, et al.

I have been advised by District Attorney JOHN J. HONAN that the Grand Jury of the County of Erie, now in session, is investigating charges of Conspiracy (Sections 105.00, 105.05, 105.10, 105.15 of the Penal Law); Bribery (Sections 200, 200.10, 200.20, 200.25, 200.30, 200.35, 200.45, 200.50 of the Penal Law); Larceny (Article 155 of the Penal Law) and other matters of every nature whatsoever appertaining thereto. I am further advised that such charge and investigation may involve me.

I have also been advised by Mr. JOHN J. HONAN that I need not appear or give evidence before said Grand Jury concerning the aforesaid matters unless I wish to do so; that I am entitled to consult counsel and that if I do testify before said Grand Jury, any testimony given by me must be voluntary on my part.

No one has made any threats or promises to me whatsoever in connection with my appearance or any testimony that I may give before the Grand Jury. I have also been advised by JOHN J. HONAN that anything I may say or testify to before said Grand Jury in said investigation can be used against me on the prosecution of any charge or

Exhibit A, Waiver of Immunity, Annexed to Foregoing Affidavit.

indictment concerning the transactions about which I may testify.

And, with full understanding of my declarations herein, and of my own free will, I hereby expressly waive any immunity that might otherwise come to me because or on account of my appearance or any testimony that I may give before said Grand Jury in connection with said investigation.

M. RUSSELL TURLEY

Dated: Buffalo, N. Y., the 8th day of February, 1971.

STATE OF NEW YORK,
COUNTY OF ERIE,
CITY OF BUFFALO

On this 8th day of February, 1971, before me personally appeared M. RUSSELL TURLEY to me known to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

.....
Notary Public.
Commissioner of Deeds.

Exhibit B, Waiver of Immunity, Annexed to Foregoing Affidavit.

COUNTY COURT, ERIE COUNTY

Pre-Indictment No. 36,369

THE PEOPLE OF THE STATE OF NEW YORK

against

JOHN DOE, et al

I have been advised by District Attorney JOHN J. HONAN that the Grand Jury of the County of Erie, now in session, is investigating charges of Conspiracy (Sections 105.00, 105.05, 105.10, 105.15 of the Penal Law); Bribery (Sections 200, 200.10, 200.20, 200.25, 200.30, 200.35, 200.45, 200.50 of the Penal Law); Larceny (Article 155 of the Penal Law) and other matters of every nature whatsoever appertaining thereto. I am further advised that such charge and investigation may involve me.

I have also been advised by Mr. JOHN J. HONAN that I need not appear or give evidence before said Grand Jury concerning the aforesaid matters unless I wish to do so; that I am entitled to consult counsel and that if I do testify before said Grand Jury, any testimony given by me must be voluntary on my part.

No one has made any threats or promises to me whatsoever in connection with my appearance or any testimony that I may give before the Grand Jury. I have also been advised by JOHN J. HONAN that anything I may say or testify to before said Grand Jury in said investigation can

Exhibit B, Waiver of Immunity, Annexed to Foregoing Affidavit.

be used against me on the prosecution of any charge or indictment concerning the transactions about which I may testify.

And, with full understanding of my declarations herein, and of my own free will, I hereby expressly waive any immunity that might otherwise come to me because or on account of my appearance or any testimony that I may give before said Grand Jury in connection with said investigation.

ROBERT H. STIEVATER

Dated: Buffalo, N. Y., the 8th day of February, 1971.

STATE OF NEW YORK,
COUNTY OF ERIE,
CITY OF BUFFALO

On this 8th day of February, 1971, before me personally appeared ROBERT H. STIEVATER to me known to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

.....

Notary Public.
Commissioner of Deeds.

[SAME TITLE]

Lefkowitz Motion for Summary Judgment.

MOTION FOR SUMMARY JUDGMENT TO RULE 56

The defendants, Louis J. Lefkowitz and Nelson A. Rockefeller, move the Court for a summary judgment pursuant to Rule 56 of the Federal Rules of Federal Procedure upon the summons and complaint herein, upon the answer herein, and upon all the papers and proceedings heretofore had.

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Defendants Lefkowitz and Rockefeller

By s/ DOUGLAS S. DALES, JR.
DOUGLAS S. DALES, JR.
Assistant Attorney General

Notice of Motion.

To: Robinson & Speller, Esqs.
Attorneys for Plaintiffs

Michael F. Dillon, Esq.
District Attorney of Erie County

Peter J. Notaro, Esq.
Assistant District Attorney
Chief, Appeals Bureau, of Counsel

Robert E. Casey, Jr., Esq.
County Attorney for the County
of Erie and Attorney for the
Defendant B. John Tutuska,

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the U. S. Courthouse, Buffalo, New York, on July 2, 1971, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Louis J. Lefkowitz
Attorney General of the State of
New York
Attorney for Defendants
Lefkowitz and Rockefeller

By s/ Douglas S. Dales, Jr.
Douglas S. Dales, Jr.
Assistant Attorney General

Tutuska Motion for Summary Judgment.

CIVIL ACTION FILE No. Civ-1971-80

MOTION FOR SUMMARY JUDGMENT
PURSUANT TO RULE 56

The defendant B. John Tutuska, moves the court for a summary judgment pursuant to Rule 56 of the Federal Rules of Federal Procedure upon the summons and complaint herein, upon the answer herein, and upon all the papers and proceedings heretofore had.

ROBERT E. CASEY, JR., Erie
County Attorney and Attorney for the
Defendant, B. John Tutuska
Office and P. O. Address
25 Delaware Avenue
Buffalo, New York 14202

By: JUSTYN E. MILLER
Assistant County Attorney

Notice of Motion.

To: Robinson & Speller, Esqs.
Attorneys for Plaintiffs

Michael F. Dillon, Esq.
District Attorney of Erie County

Peter J. Notaro, Esq.
Assistant District Attorney
Chief, Appeals Bureau of Counsel

Louis J. Lefkowitz
Attorney General of the State of New York
Attorney for Defendants, Lefkowitz and Rockefeller

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the U. S. Courthouse, Buffalo, New York, on July 2, 1971, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Robert E. Casey, Jr.
County Attorney for the County of Erie
and Attorney for the Defendant,
B. John Tutuska

By: Justyn E. Miller
Assistant County Attorney

Decision and Order Granting Three-Judge Court.

APPEARANCES: Robinson and Speller (Richard O. Robinson, of Counsel), Buffalo, New York, for Plaintiffs.

Louis J. Lefkowitz, Attorney General of the State of New York (Douglas S. Dales, Jr., Assistant Attorney General, of Counsel), Albany, New York, for Defendants Lefkowitz and Rockefeller.

Robert E. Casey, Jr., Erie County Attorney (Justyn E. Miller, Assistant County Attorney, of Counsel), Buffalo, New York, for Defendant Tutuska.

The plaintiffs in this action are two licensed architects who have in the past been employed by various municipalities and state and county agencies in New York. In February, 1971 they were called to testify before the holdover January, 1971 Erie County Grand Jury. At that time both were requested to sign waivers of immunity, and each declined while asserting his Fifth Amendment privilege against self-incrimination. Thereafter, in February, 1971, the Erie County District Attorney sent the following letter to the County Executive, County Attorney, County Legislature, State Attorney General, State Commissioner of Transportation, and the plaintiffs' architectural firm:

> Please be advised that the following persons were subpoenaed to appear before the January, 1971 Holdover Erie County Grand Jury to testify with regard to an investigation concerning transactions and contracts that they had with the County of Erie, a political subdivision of the State of New York:
>
> J. Lloyd Walker
> M. Russell Turley
> Robert H. Stievater

Pursuant to said subpoenas they were individually asked to sign a Waiver of Immunity against subsequent criminal prosecution and each refused. Mr. Walker was nonetheless called before the Grand Jury and has testified with immunity. Mr. Turley and Mr. Stievater, upon their respective refusals to sign such a waiver, were excused and have not been called before the Grand Jury.

Your attention is called to Article 5-A pertaining to Public contracts as recited in the General Municipal Law, and more specifically, Sections 103-A and 103-B, pertaining to cancellations of existing contracts and disqualifications of future contracts and awards with any political subdivision of the State of New York.

This letter is written to you pursuant to the direction contained in the law as the District Attorney conducting the investigation before the grand jury.

/s/ Michael F. Dillon
District Attorney

Claiming that the defendants now threaten to nullify the employment opportunities and contractual rights of plaintiffs as individuals and as a partnership, the plaintiffs pray for a judgment declaring Sections 103-a and 103-b of the New York General Municipal Law and Sections 2601 and 2602 of the New York Public Authorities Law violative of plaintiffs' Fifth Amendment rights. Since they further seek a permanent injunction against the operation of the above statutes, they have appropriately asked for the convening of a three-judge district court pursuant to Title 28, United States Code, Sections 2281 and 2284.

Each of the sections which plaintiffs attack was added to the laws of New York in 1959. Their background is recited in detail in *United States ex rel. Laino* v. *Warden of Wallkill Prison,* 246 F. Supp. 72 92-99 (S.D.N.Y. 1965), aff'd per

curiam, 355 F. 2d 208 (2d Cir. 1966), wherein an attack on the constitutionality of Section 103-b was unsuccessful. Aside from minor variations in language, the statutes are essentially identical. Generally, they provide that, in all contracts awarded by a municipality or public authority of the state for work or services, a clause must be inserted to provide that, upon refusal of a person to testify before a grand jury, to answer any relevant question, or to waive immunity against subsequent criminal prosecution, such person and any firm of which he is a member shall be disqualified for five years from contracting with any municipality or public authority, and any existing contracts may be cancelled by the municipality or public authority without incurring penalty.

The defendants' position is that the requirements for convoking a three-judge court are lacking and that the waiver of immunity provisions of the statutes under attack do not infringe upon any federally protected right.

Upon application for a three-judge court, the district judge must determine whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case otherwise comes within the requirements of the three-judge statute. See *Idlewild Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1962).

There is no serious question that the plaintiffs have satisfied the requirement of complying with Title 28, United States Code, Section 2284, and that a basis for equitable jurisdiction has been alleged. The determinative question at this point is whether a substantial constitutional question has been alleged. In view of recent decisions in this area, this question is not difficult to decide.

In *Holland* v. *Hogan,* 272 F.Supp. 855 (S.D.N.Y. 1967), a three-judge court was presented with the same constitutional attack on Sections 103-b and 2602. The panel's deci-

sion to abstain was reversed by the United States Supreme Court, see 20 L.Ed.2d 1342 (1968), and remanded to the panel for further consideration in light of *Gardner* v. *Broderick,* 392 U.S. 273, 20 L.Ed. 2d 1082 (1968), and *George Campbell Painting Corp.* v. *Reid,* 392 U.S. 286, 20 L.Ed.2d 1094 (1968). For reasons unknown to this court, the parties in *Holland* have not reargued, and no decision on the merits has been reached.

In *Gardner,* Section 1123 of the New York City Charter was declared unconstitutional. That section is analogous to the statutes attacked by plaintiffs here. In *Campbell,* the question of the constitutionality of Section 2601 was expressly left open.

The Court finds that plaintiffs have presented a substantial constitutional question.

Accordingly, the Honorable Chief Judge of the United States Court of Appeals for the Second Circuit is hereby requested to convene a three-judge court to hear and determine this cause.

So ordered.

JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: November 23, 1971.

Order Designating Judges.

Having been notified by the Honorable John T. Curtin, United States District Judge for the Western District of New York, that an application has been filed in the above matter for relief pursuant to Title 28 United States Code Section 2284 I hereby designate the following judges, in addition to the Honorable John T. Curtin, to hear and determine said cause as provided by law: Honorable Wilfred Feinberg, United States Circuit Judge, and Honorable John O. Henderson, Chief Judge, United States District Judge for the Western District of New York.

IT IS HEREBY ORDERED that this order be filed in the above entitled cause in the United States District Court for the Western District of New York.

HENRY J. FRIENDLY
Chief Judge
Second Circuit, U. S. Court of Appeals.

Dated: New York, New York
November 26, 1971.

Order.

In view of the attached order of designation, IT IS ORDERED:

The three-judge panel shall convene at 11:30 A.M. on January 10, 1972.

The plaintiffs' opening brief shall be filed with the Clerk of this court, served on opposing counsel, and distributed directly to each judge no later than December 27, 1971.

The defendants' briefs shall be similarly filed, served, and distributed no later than January 3, 1972.

If the plaintiffs wish to submit a reply brief, they must do so no later than January 7, 1972.

So Ordered.

JOHN T. CURTIN
United States District Judge

Dated: December 2, 1971.

Decision of Three-Judge Court.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

Civil 1971-80

M. RUSSELL TURLEY, ROBERT H. STIEVATER,
Plaintiffs,

vs.

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER,
B. JOHN TUTUSKA,
Defendants.

Before WILFRED FEINBERG, *Circuit Judge*, and JOHN O. HENDERSON and JOHN T. CURTIN, *District Judges*.

APPEARANCES: Robinson and Speller (Richard O. Robinson, of Counsel), Buffalo, New York, for Plaintiffs.

Louis J. Lefkowitz, Attorney General of the State of New York (Douglas S. Dales, Jr., Assistant Attorney General, of Counsel), Albany, New York, for Defendants Lefkowitz and Rockefeller.

James L. Magavern, Erie County Attorney (Justyn E. Miller, Assistant County Attorney, of Counsel), Buffalo, New York, for Defendant Tutuska.

CURTIN, *District Judge:*

The plaintiffs in this action are licensed architects who have in the past been employed by various municipalities

and state and county agencies in New York. In February, 1971 they were called to testify before the holdover January, 1971 Erie County Grand Jury. At that time both were requested to sign waivers of immunity, and each declined while asserting his Fifth Amendment privilege against self-incrimination. Thereafter, in February, 1971, the Erie County District Attorney sent the following letter to the County Executive, County Attorney, County Legislature, State Attorney General, State Commissioner of Transportation, and the plaintiffs' architectural firm:

> Please be advised that the following persons were subpoenaed to appear before the January, 1971 Holdover Erie County Grand Jury to testify with regard to an investigation concerning transactions and contracts that they had with the County of Erie, a political subdivision of the State of New York:
>
> J. Lloyd Walker
> M. Russell Turley
> Robert H. Stievater
>
> Pursuant to said subpoenas they were individually asked to sign a Waiver of Immunity against subsequent criminal prosecution and each refused. Mr. Walker was nonetheless called before the Grand Jury and has testified with immunity. Mr. Turley and Mr. Stievater, upon their respective refusals to sign such a waiver, were excused and have not been called before the Grand Jury.
>
> Your attention is called to Article 5-A pertaining to Public contracts as recited in the General Municipal Law, and more specifically, Sections 103-A and 103-B, pertaining to cancellations of existing contracts and disqualifications of future contracts and awards with any political subdivision of the State of New York.
>
> • • • •

Claiming that the defendants now threaten to nullify the plaintiffs' employment opportunities and contractual rights plaintiffs pray for a judgment declaring Sections 103-a[1] and 103-b[2] of the New York General Municipal Law and Sections 2601[3] and 2602[4] of the New York Public Authorities Law violative of plaintiffs' Fifth Amendment rights. Since they further seek a permanent injunction against the operation of the above statutes, a three judge panel was convened to hear argument.

Each of the sections which plaintiffs attack was added to the laws of New York in 1959. Their background is recited in detail in *United States ex rel. Laino* v. *Warden of Wallkill Prison,* 246 F.Supp. 72, 92-99 (S.D.N.Y. 1965), aff'd per curiam, 355 F.2d 208 (2d Cir. 1966), wherein an attack on the constitutionality of Section 103-b was unsuccessful. Aside from minor variations in language, the statutes are essentially identical. Generall, they provide that in all contracts awarded by a municipality or public authority of the state for Work or services, a clause must be inserted to provide that, upon refusal of a person to testify before a grand jury, to answer any relevant question, or to waive immunity against subsequent criminal prosecution, such person and any firm of which he is a member shall be disqualified for five years from contracting with any municipality or public authority, and any existing contracts may be cancelled by the municipality or public authority without incurring penalty.

The narrow issue before the court is whether plaintiffs' "testimony was demanded before the grand jury in part so that it might be used to prosecute [them], and not solely for the purpose of securing an accounting of [their] performance of [their] public trust". See *Gardner* v. *Broderick,* 392 U.S. 273, at 279 (1968). In view of the Supreme Court's decision in *Gardner* and a number of other cases, discussed below, the proper resolution of the question is not difficult.

In *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), the court held that statements made by police officers during an investigation by the state attorney general into the alleged fixing of traffic tickets were inadmissible since the choice given to them—either to forfeit their jobs or incriminate themselves—violated their constitutional privilege against self-incrimination. On the same day, in *Spevack* v. *Klein*, 385 U.S. 511 (1967), the court decided that New York could not disbar a lawyer solely for refusing, on the basis of the privilege against self-incrimination, to produce financial records and to testify at a judicial inquiry.

In *Gardner*, the court clearly set out the controlling principle. While a state may not discharge a public employee for refusing to waive a right which the Constitution guarantees to him, such a discharge would be without constitutional prohibition if, without being required to waive his immunity, the public employee fails to answer questions relevant to the performance of his official duties. The point was reiterated in *Uniformed Sanitation Men* v. *Commissioner*, 392 U.S. 280, at 284-85 (1968):

> As we stated in *Gardner* . . . if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against petitioners . . . was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons,

> to the benefit of the Constitution, including the privilege against self-incrimination. . . . At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.

Quite clearly, then, the plaintiffs' disqualification from public contracting for five years as a penalty for asserting a constitutional privilege is violative of their Fifth Amendment rights. Equally clear is that, within the proper limits, public employees are not immune from being compelled to account for their official actions in order to keep their jobs. Until rewritten so as to comply with constitutional standards, Sections 103-a and 103-b of New York's General Municipal Law and Sections 2601 and 2602 of the New York Public Authorities Law are unconstitutional, and the defendants are enjoined from their further enforcement.

So ordered.

/s/ Wilfred Feinberg
U.S.C.J.

/s/ John O. Henderson
U.S.D.J.

/s/ John T. Curtin
U.S.D.J.

Dated: April 28, 1972

FOOTNOTES

[1] Section 103-a provides:

A clause shall be inserted in all specifications or contracts made or awarded by a municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or by a fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, for work or services performed or to be performed, or goods sold or to be sold, to provide that upon the refusal of a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examines them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or with any fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, by such person, and by any firm, partnership, or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the municipal corporation or fire district without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the municipal corporation or fire district for goods delivered

or work done prior to the cancellation or termination shall be paid.

The provisions of this section as in force and effect prior to the first day of September, nineteen hundred sixty, shall apply to specifications or contracts made or awarded by a municipal corporation on or after the first day of July, nineteen hundred fifty-nine, but prior to the first day of September, nineteen hundred sixty.

[2] Section 103-b provides:

Any person who, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer and any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the organized crime task force in the department of law, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other

than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

[3] Section 2601 provides:

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority or by any official of any public authority created by the state or any political subdivision, for work or services performed or to be performed or goods sold or to be sold, to provide that upon the refusal by a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any public authority or official thereof, since the effective date of this law, by such

person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the public authority for goods delivered or work done prior to the cancellation or termination shall be paid.

[4] Section 2602 provides:

Any person, who, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision hereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant questions concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the organized crime task force in the department of law, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York, or the commissioner of general services as the case may be, and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing and any firm, partnershp or corporation of which he is a member, partner, director or officer, is known to have a contract. How-

ever, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

Lefkowitz Notice of Appeal.

Notice is hereby given that the defendants, Louis J. Lefkowitz and Nelson A. Rockefeller, hereby appeal to the Supreme Court of the United States from an order of a three-judge Federal District Court, convened in the Western District of New York, which order was entered in this action on May 1, 1972, and which declared New York General Municipal Law, §§ 103-a and 103-b, and New York Public Authorities Law, §§ 2601 and 2602, unconstitutional and enjoined the defendants from further enforcement thereof.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: Albany, New York, June 21, 1972.

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants
Lefkowitz and Rockefeller

By: Douglas S. Dales, Jr.
Assistant Attorney General

To:

Robinson & Speller, Esqs.
Attorneys for Plaintiffs

James L. Magavern, Esq.
County Attorney for the County
of Erie and Attorney for the
Defendant B. John Tutuska

Honorable John K. Adams
Clerk, United States District Court
Western District of New York

Tutuska Notice of Appeal.

Notice is hereby given that the defendant, B. John Tutuska, hereby appeals to the Supreme Court of the United States from an order of a three-judge Federal District Court, convened in the Western District of New York, which order was entered in this action on May 1, 1972, and which declared New York General Municipal Law, §§ 103-a and 103-b, and New York Public Authorities Law, §§ 2601 and 2602, unconstitutional and enjoined the defendants from further enforcement thereof.

This appeal is taken pursuant to 28 U.S.C.,§ 1253.

Dated: Buffalo, New York, June 30, 1972.

JAMES L. MAGAVERN
Erie County Attorney
Attorney for Defendant
B. John Tutuska

S/ JAMES L. MAGAVERN
Erie County Attorney

To:

ROBINSON & SPELLER, Esqs.
Attorneys for Plaintiffs

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Lefkowitz and Rockefeller

HONORABLE JOHN K. ADAMS
Clerk, United States District Court
Western District of New York

Supreme Court of the United States

No. 72-331

Louis J. Lefkowitz, et al.,

Appellants,

v.

M. Russell Turley et al.

APPEAL from the United States District Court for the Western District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

February 21, 1973

72-331

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71- 72-331

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER, B. JOHN TUTUSKA,

Appellants,

against

M. RUSSELL TURLEY and ROBERT H. STIEVATER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT FOR APPELLANTS LEFKOWITZ AND ROCKEFELLER

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BRENDA SOLOFF
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

CASES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER, B. JOHN TUTUSKA,

Appellants,

against

M. RUSSELL TURLEY and ROBERT H. STIEVATER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT FOR APPELLANTS LEFKOWITZ AND ROCKEFELLER

Appellants, Louis J. Lefkowitz and Nelson A. Rockefeller, appeal from a judgment and order of the United States District Court for the Western District of New York (statutory three-judge court) entered on May 1, 1972, declaring New York General Municipal Law, Sections 103-a and 103-b and New York Public Authorities Law, Sections 2601 and 2602, which provide for disqualification from public contracting for failure to sign a waiver of immunity, unconstitutional and enjoining their further enforcement.

Opinions Below

The decision and order of the three-judge court dated April 28, 1972 is not yet reported. It is annexed hereto as Appendix "A".

Jurisdiction

The order of the District Court was entered on May 1, 1972. The notice of appeal was filed on June 27, 1972.

The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. Section 1253.

Statutes Involved

New York General Municipal Law, Sections 103-a and 103-b and New York Public Authorities Law, Sections 2601 and 2602 are reproduced herein as Appendix "B".

Questions Presented

1. Whether a State may provide that persons who refuse to waive immunity before a grand jury investigating their contracts with a public authority shall be disqualified for five years from doing business with State and local government.

2. Whether, when a person has, as a condition of his public contract, agreed to waive immunity with respect to that contract, he may be disqualified for five years from doing business with State and local government.

3. Whether the record supports the sweeping result announced below.

Statement of the Case

Appellees are architects licensed to practice in the State of New York. At some time not set forth in the complaint, the appellees contracted to perform certain services for Erie County, New York in connection with the building of a domed stadium. On or about February 8, 1971, while still under contract, appellees were subpoenaed to appear before an Erie County Grand Jury investigating charges of conspiracy, bribery and larceny.

On that date, the Erie County District Attorney offered appellees waiver of immunity forms to execute if they chose. Both refused. Pursuant to New York General Municipal Law, Sections 103-a and 103-b, the District Attorney notified the Attorney General, the New York State Commissioner of Transportation, the Erie County Executive, the Erie County Attorney and the Erie County legislature of the refusals. The present action below followed.

Alleging that the statutes requiring each public service contract to contain a provision that the contractor agrees to waive immunity before a grand jury with respect to the contract (N.Y. General Municipal Law, Section 103-a; N.Y. Public Authorities Law, Section 2601) and the statutes providing for a five-year disqualification from public contracting on a refusal to execute such a waiver of immunity (N.Y. General Municipal Law, Section 103-b; N.Y. Public Authorities Law, Section 2602) were violative of their privilege against self-incrimination, appellees sought declaratory and injunctive relief in the court below. They contended that contracts then in force would be cancelled and that future contracts, which they desired to seek, would be barred to them. In a reply memorandum of law, appellees contended that the contract which was the subject of the grand jury investigation had not contained the clause required by statute.

A three-judge court for the Western District of New York consisting of Circuit Judge Feinberg and District

Judges Henderson and Curtin was convened. Recognizing that General Municipal Law, Section 103-b had been upheld in *United States ex rel. Laino* v. *Warden*, 246 F. Supp. 72 (S.D.N.Y. 1965), *aff'd* 355 F. 2d 208 (2d Cir. 1966), the Court nevertheless held without further inquiry that *Gardner* v. *Broderick*, 392 U.S. 273, *Uniformed Sanitation Men* v. *Commissioner*, 392 U.S. 280; *Garrity* v. *New Jersey*, 385 U.S. 493 and *Spevack* v. *Klein*, 385 U.S. 511 required a declaration of unconstitutionality because the statutes impose a penalty for assertion of the privilege against self-incrimination. Therefore, "(u)ntil rewritten so as to comply with constitutional standards" enforcement of the statutes challenged was enjoined. As a result, the State must continue to do business with contractors who will not be candid with it or must forego prosecution of contractors who render a criminal account of themselves.

ARGUMENT

The District Court has sharply curtailed the accountability of public contractors to the public. The scope of public recourse is a vital issue requiring review by this Court.

On the day that it decided *Gardner* v. *Broderick*, 392 U.S. 273 and *Uniformed Sanitation Men* v. *Commissioner*, 392 U.S. 280, this Court declined to reach the question of the validity of N.Y. Public Authorities Law, Section 2601 (*George Campbell Painting Corp.* v. *Reid*, 392 U.S. 286, 288). The Court below nevertheless held that *Gardner* and *Uniformed Sanitation Men* mandated the holding that Section 2601 and the analogous N.Y. General Municipal Law, Section 103-a are unconstitutional, and that the enforcement sections, Public Authorities Law, § 2602 and N.Y. General Municipal Law, § 103-b are also unconstitutional.

In undertaking to answer the question left open by this Court, the District Court failed to deal at all with the statutes which it held unconstitutional and failed to con-

sider the adverse impact which its decision must have on the ability of State and local government to hold its contractors to some kind of accounting. Public Authorities Law, Section 2601 and N.Y. General Municipal Law, Section 103-a require the insertion in public contracts of a clause by which the contractor, as a condition of receiving the contract, agrees to waive immunity with respect to the contract if summoned to testify. Not only was the validity of such clauses left open in *Campbell*, it was assumed in *Stevens* v. *Marks*, 383 U.S. 234. See also *Regan* v. *New York*, 349 U.S. 58.

The insertion of such clauses in public contracts is a traditional means of assuring contractor accountability both as to the quality of work and the hours by with which it is done. See Wigmore, *Evidence*, Sections 2272, 2275 (McNaughton rev. 1961). *United States ex rel. Laino* v. Wallack, 246 F. Supp. 72 (S.D.N.Y. 1965), *aff'd* 355 F. 2d 208 (2d Cir. 1966). The District Court did not, except descriptively, allude to the contract requirement or its vital function. To obtain an economic benefit by securing contracts let by competitive bidding, contractors agree to waive any claim of immunity with respect to such contracts. Of course, waiver of immunity is not itself a forbidden act nor is its request unconstitutional. See *Stevens* v. *Marks, supra.*

At the time the contract is offered the contractor has the option to agree or refuse. The only thing he loses by refusal is future economic gain from this source. Once he agrees to the terms of the contract and accepts its benefits, he must comply with it or it is breached. He cannot accept the benefits and disregard the obligations. *Fahey* v. *Malonee*, 332 U.S. 245, 255-56; *Ashwander* v. *Tennessee Valley Authority*, 298 U.S. 288, 348 (concurring opinion); *Booth Fisheries* v. *Industrial Comm.*, 271 U.S. 208; *Buck* v. *Kuykendall*, 267 U.S. 307. See also *United States* v. *Field*, 193 F. 2d 92 (2d Cir. 1951), *cert. den.* 342 U.S. 894, upholding contempt convictions of bail bondsmen who refused to reveal their records. The majority in

Field pointed out that the bondsmen had waived by contract any right to withhold such information, and that they had undertaken a position of trust in relation to the Court. Waiver by contract is, thus, a valid means of securing accountability and the cavalier disregard by the Court below of the very existence of the contract clause waiver requires scrutiny by this Court.

Not only did the Court fail to deal with the question of whether a waiver can be effected by contract but it also failed to deal with the distinction between public employment and licenses on the one hand and public contracting on the other. The public employee (*Gardner* v. *Broderick*, *supra*) and the person who depends for his livelihood on a government license (*Spevack* v. *Klein*, 385 U.S. 511) are not in the same position as a contractor for whom government contracting is merely one of several possible sources of income. Appellees, for example, are licensed architects. There is no question of their being deprived of those licenses. The only matter at issue is their right to existing public contracts and to public contracts for the next five years. The waiver they were asked to sign is the direct result of voluntary contracting. No public employment or licensing standard carries such terms.

No privilege was waived in this case and no testimony was compelled. See *Wyman* v. *James*, 400 U.S. 309, 317-18. The only result was the one for which appellees had opted. Under no anaylsis can the exercise of that option be deemed an impermissible burden on the privilege against self-incrimination.

It cannot be denied that the interest of the State in being able effectively to investigate the responsibility of its contractors is one of overwhelming importance. Nor is it unreasonable for the State to seek information, even incriminating information, from those contracting with it who may have defrauded it. If contractors do not wish to provide such cooperation, their privilege against self-incrimination assures that they need not. But there

should be no further obligation on the part of the State to use and pay for the services of contractors who will not be candid with it. See, Memorandum of the Governor, N.Y. State Legislative Annual (1959), p. 431. The State in exchange for public bidding must be afforded the right to fix the terms and conditions to prevent and terminate possible frauds and collusion. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 126-127. See also 41 C.F.R. §1-1.317 (1965) (Federal Procurement Regulations). The "rock and the whirlpool" dilemma faced by the recalcitrant contractor is no more real than that faced by the State which, to secure an accounting, must grant immunity from use of the information received.* However the balance may tip when one side of the equation is the right to a livelihood, the result where contracting is at issue must be the right either to an accounting or to a severing of the business relationship. The ultimate option is with the contractor just as the initial option was.

Even assuming *arguendo* that appellees' privilege against self-incrimination was impermissibly burdened, the decision to enjoin the General Municipal and Public Authorities Law was incorrect on the record before the District Court. In the first place appellees claimed below that their contract did not contain the clause required by Section 103-a. The contract itself was not introduced; the District Court made no finding of fact as to whether the clause was or was not present. Surely, the record was totally inadequate for the sweeping holding announced below. If the clause in fact was not present then it was incumbent on the Court to determine if the clause had to be read into the contract by virtue of the statute, or whether there had been a violation of State law. If the clause did not apply then the statute

---

* Transfer of the inquiry to an administrative body does not alter the situation since immunity must still be granted to secure the information desired. See *Gardner* v. *Broderick*, *supra* at 278; *Uniformed Sanitation Men* v. *Commissioner of Sanitation*, *supra* at 284.

was not complied with. The court was therefore without jurisdiction to consider statutory validity, being limited rather to the question of whether what in fact was done was a violation of rights.

Second, by enjoining the total operation of the statutes the District Court has made them inapplicable even to corporations which do the bulk of State contracting and has overruled the decision of this Court in *George Campbell Painting Corp.* v. *Reid, supra.* The question of corporate accountability is also involved in *Holland* v. *Hogan,* 392 U.S. 654 which is still pending after the remand by this Court.

Finally, by enjoining these statutes "until rewritten" the Court failed to allow for the fact that the revision of other statutes might validate the statutes under attack. In fact, that is what has happened in New York. Between 1953 and 1971 New York's immunity statute required that the privilege be claimed with respect to each question asked, leading to the dilemma that even testimony under an invalid waiver would not lead to immunity. See *Stevens* v. *Marks,* 383 U.S. 234, 241-42. This was the statute under which appellees were called. However, since they did not testify and since *Stevens* had been decided that dilemma did not face them. But effective September 1, 1971, New York returned to the automatic immunity scheme in existence before 1953. (N.Y. Criminal Procedure Law, Section 190.40). Waivers under this scheme were upheld by this Court in *Regan* v. *New York, supra* which was approved in *Stevens* v. *Marks, supra.* Accordingly, even if appellees were entitled to some relief the injunction was overbroad and not necessary to protect any rights of appellees.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, August 23, 1972

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BRENDA SOLOFF
Assistant Attorney General
of Counsel

Appendix "A".

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civ—1971-80

M. RUSSELL TURLEY & 1

v.

LOUIS J. LEFKOWITZ, et al.

SIR:

Take notice of an ORDER, of which the within is a copy, duly granted in the within entitled action on the 28th day of April, 1972, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 1st day of May, 1972.

Dated: Buffalo, New York, May 1, 1972.

JOHN K. ADAMS, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

To Richard O. Robinson
Attorney for Plaintiff

To Louis J. Lefkowitz (Alb.)
Attorney for Defendants-Lefkowitz & Rockefeller

To James L. Magavern
Attorney for Defendant-Tutuska

FEDERAL RULES OF CIVIL PROCEDURE 77(d)

Appendix "A"

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 1971-80

M. RUSSELL TURLEY, ROBERT H. STIEVATER,
Plaintiffs,

vs.

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER,
B. JOHN TUTUSKA,
Defendants.

Before WILFRED FEINBERG, *Circuit Judge*, and JOHN O. HENDERSON and JOHN T. CURTIN, *District Judges*.

APPEARANCES: Robinson and Speller (Richard O. Robinson, of Counsel), Buffalo, New York, for Plaintiffs.

Louis J. Lefkowitz, Attorney General of the State of New York (Douglas S. Dales, Jr., Assistant Attorney General, of Counsel), Albany, New York, for Defendants Lefkowitz and Rockefeller.

James L. Magavern, Erie County Attorney (Justyn E. Miller, Assistant County Attorney, of Counsel), Buffalo, New York, for Defendant Tutuska.

CURTIN, *District Judge:*

The plaintiffs in this action are licensed architects who have in the past been employed by various municipalities

and state and county agencies in New York. In February, 1971 they were called to testify before the holdever January, 1971 Erie County Grand Jury. At that time both were requested to sign waivers of immunity, and each declined while asserting his Fifth Amendment privilege against self-incrimination. Thereafter, in February, 1971, the Erie County District Attorney sent the following letter to the County Executive, County Attorney, County Legislature, State Attorney General, State Commissioner of Transportation, and the plaintiffs' architectural firm:

> Please be advised that the following persons were subpoenaed to appear before the January, 1971 Holdover Erie County Grand Jury to testify with regard to an investigation concerning transactions and contracts that they had with the County of Erie, a political subdivision of the State of New York:
>
> J. Lloyd Walker
> M. Russell Turley
> Robert H. Stievater
>
> Pursuant to said subpoenas they were individually asked to sign a Waiver of Immunity against subsequent criminal prosecution and each refused. Mr. Walker was nonetheless called before the Grand Jury and has testified with immunity. Mr. Turley and Mr. Stievater, upon their respective refusals to sign such a waiver, were excused and have not been called before the Grand Jury.
>
> Your attention is called to Article 5-A pertaining to Public contracts as recited in the General Municipal Law, and more specifically, Sections 103-A and 103-B, pertaining to cancellations of existing contracts and disqualifications of future contracts and awards with any political subdivision of the State of New York.

* * * *

Appendix "A"

Claiming that the defendants now threaten to nullify the plaintiffs' employment opportunities and contractual rights plaintiffs pray for a judgment declaring Sections 103-a[1] and 103-b[2] of the New York General Municipal Law and Sections 2601[3] and 2602[4] of the New York Public Authorities Law violative of plaintiffs' Fifth Amendment rights. Since they further seek a permanent injunction against the operation of the above statutes, a three judge panel was convened to hear argument.

Each of the sections which plaintiffs attack was added to the laws of New York in 1959. Their background is recited in detail in *United States ex rel. Laino* v. *Warden of Wallkill Prison,* 246 F.Supp. 72, 92-99 (S.D.N.Y 1965), aff'd per curiam, 355 F.2d 208 (2d Cir. 1966), wherein an attack on the constitutionality of Section 103-b was unsuccessful. Aside from minor variations in language, the statutes are essentially identical. Generally, they provide that in all contracts awarded by a municipality or public authority of the state for work or services, a clause must be inserted to provide that, upon refusal of a person to testify before a grand jury, to answer any relevant question, or to waive immunity against subsequent criminal prosecution, such person and any firm of which he is a member shall be disqualified for five years from contracting with any municipality or public authority, and any existing contracts may be cancelled by the municipality or public authority without incurring penalty.

The narrow issue before the court is whether plaintiffs' "testimony was demanded before the grand jury in part so that it might be used to prosecute [them], and not solely for the purpose of securing an accounting of [their] performance of [their] public trust". See *Gardner* v. *Broderick,* 392 U.S. 273, at 279 (1968). In view of the Supreme Court's decision in *Gardner* and a number of other cases, discussed below, the proper resolution of the question is not difficult.

Appendix "A"

In *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), the court held that statements made by police officers during an investigation by the state attorney general into the alleged fixing of traffic tickets were inadmissible since the choice given to them—either to forfeit their jobs or incriminate themselves—violated their constitutional privilege against self-incrimination. On the same day, in *Spevack* v. *Klein*, 385 U.S. 511 (1967), the court decided that New York could not disbar a lawyer solely for refusing, on the basis of the privilege against self-incrimination, to produce financial records and to testify at a judicial inquiry.

In *Gardner*, the court clearly set out the controlling principle. While a state may not discharge a public employee for refusing to waive a right which the Constitution guarantees to him, such a discharge would be without constitutional prohibition if, without being required to waive his immunity, the public employee fails to answer questions relevant to the performance of his official duties. The point was reiterated in *Uniformed Sanitation Men* v. *Commissioner*, 392 U.S. 280, at 284-85 (1968):

> As we stated in *Gardner* . . . if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against petitioners . . . was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the priv-

ilege against self-incrimination. . . . At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.

Quite clearly, then, the plaintiffs' disqualification from public contracting for five years as a penalty for asserting a constitutional privilege is violative of their Fifth Amendment rights. Equally clear is that, within the proper limits, public employees are not immune from being compelled to account for their official actions in order to keep their jobs. Until rewritten so as to comply with constitutional standards, Sections 103-a and 103-b of New York's General Municipal Law and Sections 2601 and 2602 of the New York Public Authorities Law are unconstitutional, and the defendants are enjoined from their further enforcement.

So ordered.

/s/ Wilfred Feinberg
U.S.C.J.

/s/ John O. Henderson
U.S.D.J.

/s/ John T. Curtin
U.S.D.J.

Dated: April 28, 1972

FOOTNOTES

[1] Section 103-a provides:

A clause shall be inserted in all specifications or contracts made or awarded by a municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or by a fire district or

any agency or official thereof on or after the first day of September, nineteen hundred sixty, for work or services performed or to be performed, or goods sold or to be sold, to provide that upon the refusal of a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examines them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or with any fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, by such person, and by any firm, partnership, or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the municipal corporation or fire district without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the municipal corporation or fire district for goods delivered or work done prior to the cancellation or termination shall be paid.

The provisions of this section as in force and effect prior to the first day of September, nineteen hundred sixty, shall apply to specifications or contracts made or awarded by a municipal corporation on or after the first day of July, nineteen hundred fifty-nine, but prior to the first day of September, nineteen hundred sixty.

[2] Section 103-b provides:

Any person who, when called before a grand jury, head of a state department, temporary state commission or other state

agency, the organized crime task force in the department of law, head of a city department or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer and any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the organized crime task force in the department of law, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in

which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

[3] Section 2601 provides:

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority or by any official of any public authority created by the state or any political subdivision, for work or services performed or to be performed or goods sold or to be sold, to provide that upon the refusal by a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any public authority or official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the public authority for goods delivered or work done prior to the cancellation or termination shall be paid.

[4] Section 2602 provides:

Any person, who, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and ex-

amine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant questions concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the organized crime task force in the department of law, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York, or the commissioner of general services as the case may be, and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

APPENDIX "B"

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 1971-80

M. RUSSELL TURLEY
ROBERT H. STIEVATER

Plaintiffs

vs

LOUIS J. LEFKOWITZ
NELSON A. ROCKEFELLER
B. JOHN TUTUSKA

Defendants

DECISION & ORDER

FEINBERG, Circuit Judge
HENDERSON, District Judge
CURTIN, District Judge

GENERAL MUNICIPAL LAW

Section 103-a. Ground for cancellation of contract by municipal corporations and fire districts:

A clause shall be inserted in all specifications or contracts made or awarded by a municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or by a fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, for work or services performed or to be performed, or goods sold or to be sold, to provide that upon the refusal of a person,

when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract,

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from therafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation, or fire district, or any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or with any fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, by such person, and by any firm, partnership, or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the municipal corporation or fire district without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the municipal corporation or fire district for goods delivered or work done prior to the cancellation or termination shall be paid.

Appendix "B"

The provisions of this section as in force and effect prior to the first day of September, nineteen hundred sixty, shall apply to specifications or contracts made or awarded by a municipal corporation on or after the first day of July, nineteen hundred fifty-nine, but prior to the first day of September, nineteen hundred sixty.

Section 103-b. Disqualification to contract with municipal corporations and fire districts:

Any person, who, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the head of a city department or other city agency before which the refusal occurs to send notice

of such refusal, together with the names of any firm, partnership, or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body *other* than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

PUBLIC AUTHORITIES LAW

Article 9—General Provisions

(Title 3-A—Contracts of Public Authorities)

Section 2601. Ground for cancellation of contract by public authority:

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority

or by any official of any public authority created by the state or any political subdivision, for work or services performed or to be performed or goods sold or to be sold, to provide that upon refusal by a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract,

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any public authority or official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the public authority for goods delivered or work done prior to the cancellation or termination shall be paid.

Appendix "B"

SECTION 2602. Disqualification to contract with public authority:

Any person who, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director, or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York, or the commissioner of general services as

the case may be, and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

IN THE

Supreme Court of the United States

No. 72-331

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER, B. JOHN TUTUSKA,

Appellants,

against

M. RUSSELL TURLEY and ROBERT H. STIEVATER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM

RICHARD O. ROBINSON
ROBINSON & SPELLER, P. C.,
Attorneys for Appellees,
Office & Post Office Address,
606 Liberty Bank Building,
Buffalo, New York 14202.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

Table of Cases.

Statutes.

Constitution.

IN THE

Supreme Court of the United States

No. 72-331

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER, B. JOHN TUTUSKA,

Appellants,

against

M. RUSSELL TURLEY and ROBERT H. STIEVATER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM

The Appellees move the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the United States District Court for the Western District of New York entered on May 1, 1972 declaring New York General Municipal Law, Sections 103-a and 103-b and New York Public Authorities Law, Section 2601 and Section 2602, unconstitutional, on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to need no further arguments.

I.

The State Statutes Involved and the Nature of the Case

A.

The Statutes.

New York General Municipal Law, Sections 103-a and 103-b and New York Public Authorities Law, Sections 2601 and 2602 are reproduced as Appendix "B" in the jurisdictional statement for Appellants Lefkowitz and Rockefeller. The Statutes provide that as a penalty for refusal to sign a waiver of immunity in Grand Jury proceedings a witness shall be disqualified from public contracting and existing contracts may be cancelled.

B.

The Proceedings Below.

Appellees, architects licensed in the State of New York, have sought declaratory and injunctive relief from the above statutes as a result of their refusal to sign waivers of immunity in certain Grand Jury proceedings conducted in Erie County, New York allegedly investigating charges of conspiracy, bribery and larceny regarding the proposed construction of a stadium in Erie County which Appellees were then designing.

Upon motion for summary judgment, a three-judge court for the Western District of New York has ordered and adjudged that the above statutes are unconstitutional and has enjoined Appellants from further enforcement pursuant to said statutes.

II.

ARGUMENT

The case presents no substantial question not previously decided by this Court.

In *Perla vs. State of New York,* 392 U. S. 296 (1968) the Court held that a public employee could not be discharged from employment pursuant to Section 6 of Article I of the New York State Constitution for refusal to sign a waiver of immunity in an Erie County Grand Jury investigation concerning directly his public office.

In *Garrity vs. New Jersey,* 385 U. S. 493 (1967) the Court held that statements made in an investigation of police officers under threat of job forfeiture could not be used in subsequent proceedings against such officers since such testimony was given under compulsion.

In *Spevack vs. Klein,* 385 U. S. 511 (1967) the Court held that an attorney may not be penalized with disbarment for exercising his fifth amendment privilege in professional disciplinary proceedings.

In *Gardner vs. Broderick,* 392 U. S. 273 (1968) the Court struck down a New York City Charter provision for the discharge of a police officer who refused to waive immunity from prosecution.

In *Uniformed Sanitation Men Association vs. Commissioner of Sanitation,* 392 U. S. 580 (1968) it was held that discharge of City employees for refusal to sign waivers of immunity before a Grand Jury or for invoking their constitutional privilege was unconstitutional.

The State, of course, attempts to find a distinction in the proposed conclusion that garbage collectors (*Uniform*

Sanitation Men Association vs. Commissioner of Sanitation, supra) have less freedom of choice to contract for employment than architects in contracting for the design of public buildings, an argument characterized as "facile but question-begging generalizations" in *Holland vs. Hogan,* 272 F. Supp. 855, 869 (S. D. N. Y. 1967), reversed and remanded, 392 U. S. 654 (1967).

The State's interests are not unprotected by the above decisions. The State may at any time discharge an employee or impose a penalty on a contractor, presumably, who refuses to answer questions "specifically, directly and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself." (*Gardner vs. Broderick, supra* at 278.)

III.

CONCLUSION

All questions raised upon this appeal have been repeatedly ruled upon by this Court and no substantial new questions are presented herein.

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument and Appellee respectfully moves this Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the cause by the District Court of the Western District of New York.

Respectfully submitted,

RICHARD O. ROBINSON,
Attorney for Appellees.

To:

THE HON. LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York,
Attorney for Appellants.

SAMUEL A. HIRSHOWITZ,
First Assistant Attorney General.

BRENDA SOLOFF,
Assistant Attorney General,
Of Counsel.

THE HON. MICHAEL RODAK, JR.,
Clerk of the Supreme Court
of the United States.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-331

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER, B. JOHN TUTUSKA,

Appellants,

against

M. RUSSELL TURLEY and ROBERT H. STIEVATER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS LEFKOWITZ AND ROCKEFELLER

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants
Lefkowitz and Rockefeller
Office & P.O. Address
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BRENDA SOLOFF
Assistant Attorney General
Of Counsel

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-331

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER, B. JOHN TUTUSKA,

Appellants,

against

M. RUSSELL TURLEY and ROBERT H. STIEVATER,

Appellees.

BRIEF FOR APPELLANTS LEFKOWITZ AND ROCKEFELLER

Opinions Below

The opinion of the single district judge ordering the convening of a three-judge district court (A. 49-52) is not reported. The opinion of the three-judge district court granting declaratory and injunctive relief (A. 55-64) is reported at 342 F. Supp. 544.

Jurisdiction

The judgment and order of the District Court were entered on May 1, 1972 (A. 2). The notice of appeal was filed on June 29, 1972 (A. 2, 65). The jurisdictional state-

ment was filed on August 26, 1972. This Court noted probable jurisdiction on February 20, 1973.

The jurisdiction of this Court rests on 28 U.S.C. § 1253.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution, as pertinent herein, provides:

> ". . . [N]or shall any person . . . be compelled in any criminal case to be a witness against himself. . . ."

New York General Municipal Law §§ 103-a, 103-b and New York Public Authorities Law, §§ 2601 and 2602, which were struck down by the Court below are set forth in the appendix to this brief at pages 22 to , *infra*.

Questions Presented

1. Whether a public contract may constitutionally provide that a refusal to waive immunity with respect to the contract may result in loss of the contract and shall result in disqualification from contracting for five years.

2. Whether a public contractor may be disqualified from further contracts for five years on his refusal to waive immunity with respect to his contracts.

3. Whether the sweeping result announced below is justified by the record.

Statement of the Case

Appellees brought this action for declaratory and injunctive relief against the continued enforcement of New York General Municipal Law, §§ 103-a, 103-b and New

York Public Authorities Law, §§ 2601 and 2602. These statutes provide, in essence, that every public contract shall contain a provision that, on the refusal of a contractor to waive immunity when called to testify "concerning any transaction or contract had with the state" or its subdivisions, agencies or authorities or on the refusal "to answer any relevant question concerning such transaction or contract", the person called and any business concern to which he belongs shall be disqualified from further contracting for five years after refusal. Moreover, any public contracts in effect at the time of the refusal may be cancelled on payment of monies owing for goods delivered or work done prior to the cancellation (N.Y. General Municipal Law, § 103-a; N.Y. Public Authorities Law, § 2601).

New York General Municipal Law, § 103-b and New York Public Authorities Law, § 2602 also provide for a five year disqualification from contracting on the failure to waive immunity or to testify* and provide in addition that the officer conducting the investigation must notify the appropriate authorities of the names of the persons refusing to waive or to testify and must also send notice of the names of the concerns to which such people belong.

Appellees are architects licensed to practice in the State of New York (A. 5). They were members of a partnership which, they claimed, had "various contracts" with Erie County, New York (A. 8), including one for the construction, in that county, of a domed stadium (A. 37). On February 8, 1971, while under County contract (A. 30), appellees were subpoenaed to testify before an Erie County grand jury respecting transactions and contracts that they

---

* The disqualification provisions of §§ 103-b and 2602 were designed to cover past contracts in contrast to §§ 103-a and 2601 covering contracts in existence when the testimony is requested (N.Y. Legislative Annual, 1959, pp. 147, 148 [Memorandum of the Attorney General]).

had with the County (A. 6, 30, 39). Before being called before the grand jury, each was presented with a waiver of immunity which he was asked to sign (A. 6-7, 30). Each refused to sign the waiver (A. 7, 30) and neither was called to testify (A. 40). A third member of the partnership, J. Lloyd Walker, also refused to sign a waiver of immunity (A. 39). He was granted immunity and testified (A. 40).

Pursuant to N. Y. General Municipal Law, § 103-b, on February 9, 1971, Michael F. Dillon, the District Attorney of Erie County, notified the appellants Attorney General Lefkowitz and County Executive Tutuska, the Commissioner of Transportation of the State of New York, the Erie County Attorney and the Erie County Legislature of the refusals to waive immunity (A. 39-40).

On March 2, 1971, appellees commenced the present action alleging that the statutes in question violate the privilege against self-incrimination. They alleged that they had been in the past and expected in the future to be employed by various State agencies and subdivisions (A. 5), that they had been asked to and had refused to waive immunity (A. 7), that the appellant Tutuska "may" threaten to cancel or terminate various contracts between the County of Erie and the partnership of which plaintiffs were members on the grounds of General Municipal Law, § 103-a (A. 7-8), and that they as individuals or as members of a firm wished to enter into future public contracts (A. 8).

The District Attorney of Erie County was dismissed as a defendant on a finding by the single district judge that the case against him was moot since he had discharged his statutory obligations (A. 33-34). With respect to the remaining defendants, the single district judge found the complaint to set forth a substantial federal question and ordered the convening of a three-judge district court (A. 49-52).

With a paucity of reasoning and a dearth of facts, the Court granted the relief requested. Although recognizing that General Municipal Law, § 103-b had been upheld in *United States ex rel. Laino* v. *Warden*, 246 F. Supp. 72 (S.D.N.Y. 1965), *aff'd* 355 F. 2d 208 (2d Cir. 1966), the Court held, without further analysis, that *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men* v. *Commissioner*, 392 U.S. 280 (1968); *Garrity* v. *New Jersey*, 385 U.S. 493 (1966), and *Spevack* v. *Klein*, 385 U.S. 511 (1966) mandated a declaration of unconstitutionality because the statutes allegedly impose a penalty for assertion of the privilege against self-incrimination. Therefore, "[u]ntil rewritten so as to comply with constitutional standards" the statutes were declared unconstitutional and their enforcement was enjoined (A. 59).

Summary of Argument

In providing for suspension from public contracting of contractors who decline to waive immunity with respect to their contracts (N.Y. General Municipal Law, §§ 103-a, 103-b; N.Y. Public Authorities Law, §§ 2601, 2602), New York has not impermissibly burdened the contractors' privilege against self-incrimination. The statutes are integral parts of a valid and important State program enacted in pursuit of honesty in public contracting. Unconditioned candor is not an unreasonable demand from someone seeking the benefit of State contracts. The possible termination of contracts and the five-year suspension from future contracting are precisely what contractors agree to in accepting the benefits of contracts. They thereby waive any complaint when the contract is sought to be enforced.

Moreover, contractors are in a position wholly different from that of public employees and licensees (*Gardner* v. *Broderick*, 392 U.S. 273 [1968]; *Spevack* v. *Klein*, 385 U.S. 511 [1966]). The contractor's obligation to account for

his transactions is at least as high as the public employee's obligation to account for the manner in which he discharges his duties and greater than any obligation of the licensee. At the same time, the contractor is not subject to the same consequences which befell the policeman in *Gardner* or the attorney in *Spevak*. He loses neither his living nor his license. He loses only certain business opportunities for a limited period of time. Furthermore, unlike the provision of the New York City Charter under which it was attempted to discharge the petitioner in *Gardner* v. *Broderick, supra,* the statutes in issue here limit the scope of a waiver to the subject matter of the special relationship, that is, the contract and transactions had with the State. The New York City Charter provision (§ 1123) is much broader in scope. Accordingly, while a prior waiver was not acceptable under the City Charter, it is permissible in this case.

The right asserted here must be evaluated by balancing the interests and consequences involved. Clearly, the balance favors the present scheme. The dilemma in which appellees purport to find themselves is of no constitutional significance under the circumstances of this case and no more serious than many other dilemmas which courts have found to give no right to relief.

Finally, the result below was not warranted by the record. Appellees did not claim to have any contracts with the State as individuals, claiming instead that their partnership had such contracts. Therefore, at least existing contracts could be cancelled without violating individual rights. The result below would also appear to include corporations notwithstanding that they have no privilege against self-incrimination.

The bulk of State services are rendered on contracts let through competitive bidding. It is not asking too much that the people who secure these contracts be open and candid about them and that they either give information freely and without reservation or forego them.

POINT I

The laws providing for cancellation of contracts and disqualification from contracting on a refusal to waive immunity establish valid contract provisions and do not violate the privilege against self-incrimination.

The people who contract to provide goods and services to the State and its agencies and subdivisions receive a considerable percentage of the State fisc. There can be no doubt that corrupt practices in the obtaining and execution of public contracts are inimical to the public welfare. In order to promote honesty in contracting, New York has enacted a comprehensive program. State policy with respect to the letting of public contracts is typified in N. Y. State Finance Law, § 174, providing, *inter alia*, that such contracts:

> "shall be let to the lowest responsible bidder, as will best promote the public interest, taking into consideration the reliability of the bidder, the qualities of the articles proposed to be supplied, their conformity with the specifications, the purposes for which required and the terms of delivery; provided, however, that no such contract shall be let to a bidder, other than the lowest responsible bidder without the written approval of the comptroller . . . Each bid with the name of the bidder shall be entered of record and each record, with the successful bid indicated, shall be open to public inspection."

To the same effect are, *e.g.*, N. Y. General Municipal Law § 103; N. Y. Highway Law, § 38; N. Y. Education Law, § 2556(10); See also N. Y. Public Housing Law, § 151. It is of the highest importance in New York that there be no collusive bidding or bid rigging for public contracts. Thus, every public contract requires proper assurance to that effect as one of its conditions. See *e.g.*, N. Y. Gen-

eral Municipal Law, § 103-d; N. Y. Public Authorities Law, § 2604; N. Y. Public Housing Law, § 151; N. Y. State Finance Law, § 139-d. The federal requirement is similar. A "certificate of independent price determination" clause must be set out in almost all bids for government contracts. 41 C.F.R. § 1-1.317.

The object of the New York bidding laws is "the benefit and protection of the public". *Matter of Zara Contracting Co. Inc.* v. *Cohen*, 45 Misc. 2d 497, 499, 257 N.Y.S. 2d 479 (Sup. Ct. Albany Co. 1964), *aff'd.* 23 A.D. 2d 718, 257 N.Y.S. 2d 118 (3rd Dept.), *lv. to app. den.* 16 N.Y. 2d 482 (1965). A determination as to the lowest responsible bidder, for example, requires a determination of "integrity and moral worth". *Matter of Caristo Constr. Corp.* v. *Rubin*, 30 Misc. 2d 185, 198, 221 N.Y.S. 2d 956, 969 (Sup. Ct. Kings Co.), *aff'd.* 15 A.D. 2d 561, 222 N.Y.S. 2d 998 (2d Dept. 1961), *aff'd.* 10 N.Y. 2d 539, 225 N.Y.S. 2d 502; *Matter of Arglo Painting Corp.* v. *Board of Education*, 47 Misc. 2d 618, 620-21, 263 N.Y.S. 2d 124 (Sup. Ct. Kings Co. 1965); *Picone* v. *City of New York*, 176 Misc. 967, 29 N.Y.S. 2d 539 (Sup. Ct. N.Y. Co. 1941); *Matter of Limitone* v. *Galgano*, 21 Misc. 2d 376, 189 N.Y.S. 2d 738 (Sup. Ct. Westch. Co. 1959). Almost all federal government contracts must contain a provision that the contractor agrees to let the Comptroller General and his representatives examine all records directly pertaining to and involving transactions relating to the prime contract of subcontract for a period of three years from final payment. 10 U.S.C. § 2313(b); 41 U.S.C. § 254(c). And the federal contracting officer must be able to assess the responsibility of the contractor. 41 C.F.R. §§ 1-1.1200-1-1.1207.

In order to determine whether or not bidders and contractors are responsible, the State must be able to insure candor on the part of public contractors and to protect the public from persons or corporations which refuse to be candid in their public dealings. This was precisely the

legislative purpose in enacting General Municipal Law, §§ 103-a, 103-b, Public Authorities Law, §§ 2601, 2602 and similar statutes.*

In approving this legislation, Governor Rockefeller pointed out:

> "Unlike a private person who may contract with whom he wishes, a public agency usually lets contracts by public auction and is required to accept the lowest bid. For that reason, it would seem appropriate to disqualify the bids of persons who are unwilling to disclose to a grand jury facts relating to some prior contract with the public. Likewise, it would seem appropriate that public contracts should provide that the benefits accruing under them be available only so long as the beneficiary is willing, when required by a grand jury, to disclose any information he may have as to a public contract." Memorandum of the Governor, New York State Legislative Annual (1959), p. 431.

See *United States* v. *Acme Process Co.*, 385 U.S. 138, 144 (1966).

There is, thus, a strong state policy and interest in honest contracting. It is a *sine qua non* of overseeing contractors that they be required to supply appropriate officials with continuing information with respect to their contracts. "[I]t would be difficult to gainsay the reasonableness of the state's effort to impose legislatively upon those with whom it does business a continuing duty of candor and disclosure concerning their transactions with the state". *Holland* v. *Hogan*, 272 F. Supp. 855, 869 (S.D.N.Y. 1967) (3 Judge Court), *remanded* 392 U.S. 654 (1968). See also *Copper Plumbing & Heating Co.* v. *Campbell*, 290 F.

---

* N. Y. State Finance Law § 139a, -b; N. Y. Public Housing Law, § 151.

2d 368 (D. C. Cir. 1961); *United States ex rel. Laino* v. *Warden*, 246 F. Supp. 72, 93-94 (S.D.N.Y. 1965), *aff'd.* 355 F. 2d 208 (2d Cir. 1966). Indeed, in dealing with public contractors, this Court long ago held, in *McMullen* v. *Hoffman*, 174 U.S. 639, 651 (1899), that public contracts cannot be surrounded with too many precautions directed at obtaining perfectly fair and bona fide bids. And, the contents of the Legislative intent are known in advance of entering into any contract.

Notwithstanding that the New York statutes requiring either unconditioned testimony or discontinuance of the business relationship are an integral part of the legislative intent to secure honest contracting, the court below, in overbroad reliance on the decisions of this Court, particularly on *Gardner* v. *Broderick*, 392 U.S. 273 (1968), held that the statutes represent an impermissible burden on the privilege against self incrimination. In so doing, the Court did not even mention two vitally important and independently distinguishing factors. The first is that the discontinuance of the business relationship on a refusal to waive immunity is precisely what appellees contracted for.* The second is that contractors are not in the same position as either public employees or licensees with respect to the State. In short, what the Court below regarded as falling squarely within *Gardner* v. *Broderick*, *supra* is, in reality, an unwarranted extension of the rule in that case.

New York General Municipal Law, § 103-a and New York Public Authorities Law, § 2601 do not require anyone to

---

* Appellants suggested in the jurisdictional statement that appellees' belated assertion in a memorandum by law to the District Court the stadium contract did not contain the clause required by § 103-a might merit exploration on a remand to the District Court. A closer reading of the complaint reveals, however, that appellees claimed that their partnership had "various contracts" with Erie County subject to § 103-a, a claim admitted by appellant Tutuska (A. 26). Accordingly, on the present record, it must be assumed that the clause existed.

contract to waive immunity against prosecution. They do require each contract to provide that refusal to waive such immunity will lead to a five-year disqualification from further contracting and may lead to a cancellation of existing contracts. The insertion of such clauses in public contracts is a traditional means of assuring contractor accountability as to both the quality of the work and the integrity with which it is done. See WIGMORE, Evidence, Vol. VIII, Sections 2272, 2275 (McNaughton rev. 1961); *United States ex rel. Laino* v. *Warden, supra.* To obtain an economic benefit by securing contracts let by competitive bidding, contractors agree to certain consequences if they refuse to be candid about those contracts. Such a clause is binding. As this Court held in *Zap* v. *United States,* 328 U.S. 624, 628 (1946):

> "[T]he law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But these rights may be waived. And when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts."

See also, *United States* v. *Biswell,* 406 U.S. 311, 316 (1972), relying on the fact that a dealer in a closely regulated business knows, when he enters the business, that he must submit to certain forms of inspection. The enforcement of candor by a refusal to do business is one of the few defenses available to a State against an unlawful drain on its resources. In fact, refusal to do business is the most reasonable recourse available.

If a clause is valid when inserted into a contract, it is no less valid when it is sought to be enforced. Certainly the clause was not in and of itself invalid. *Zap* v. *United*

States, supra. And, it was reasonably related to an important state interest. See, *e.g., Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940); *People* v. *Crane*, 214 N.Y. 154, 168, *aff'd. sub. nom. Crane* v. *New York*, 239 U.S. 195 (1915); *Atkin* v. *Kansas*, 191 U.S. 207 (1903); Walsh-Healey Act (41 U.S.C. §§ 35, 45). *Cf. Frost Trucking Co.* v. *R. R. Comm.*, 271 U.S. 583 (1926), in which the regulation was held not reasonably related to the announced stautory purpose.

At the time the contract is offered, the contractor has the option to agree or to refuse. The only thing he loses by refusal is future economic gain from this source. Once he agrees to the terms of the contract and accepts its benefits, he must comply with it or it is breached. He cannot accept the benefits and disregard the obligations. *Fahey* v. *Malonee*, 332 U.S. 245, 255-56 (1947); *Ashwander* v. *Tennessee Valley Authority*, 298 U.S. 348 (1936) (concurring opinion); *Booth Fisheries* v. *Industrial Comm.*, 271 U.S. 208 (1926); *Buck* v. *Kuykendall*, 267 U.S. 307 (1925).

In *United States* v. *Field*, 193 F. 2d 92 (2d Cir.) *cert. denied* 342 U.S. 894 (1951), upholding contempt convictions of bail bondsmen who refused to reveal their records notwithstanding that they had contracted to waive their privilege against self-incrimination. The bondsmen's special relationship to the Court was held to justify specific enforcement of a contract clause waiving the privilege (see WIGMORE, *supra*, § 2275). Here, the contract clause involved does not require waiver of the privilege; the privilege was not waived and no testimony was compelled. See *Wyman* v. *James*, 400 U.S. 309, 317-18 (1971). The only result was one for which appellees had opted.

Moreover, if appellees believed the condition unreasonable and regarded themselves as otherwise entitled to the contracts, the time to complain was *before* they were signed. The means for voicing such a complaint was a proceeding in the nature of mandamus pursuant to Article

78 of the New York Civil Practice Law and Rules. See, *e.g., Dictaphone Corporation* v. *O'Leary,* 287 N.Y. 491, 41 N.E. 2d 68 (1942). Having failed to complain at the outset, the appellees cannot complain now.

The second vital area in which the District Court failed to distinguish between this case and *Gardner* v. *Broderick, supra,* lies in the differences, even apart from any explicit waiver clause in the contract, among public contractors, public employees and mere licensees. First, the contractor's relationship to the State places on him as high a degree of accountability as that falling on the public employee and a higher degree of accountability than would fall on him by virtue solely of any license he might also have (see pp. 7 to 10, *supra*). See *Spevack* v. *Klein, supra,* at 520 (FORTAS, J. concurring).

Second, under New York law, the consequences for failure to discharge the reasonable obligation are much less severe than those sought to be imposed on public employees, as to whom the obligation was nevertheless reasonable (*Gardner* v. *Broderick, supra* at 278) and also much less severe than those imposed on licensees, as to whom the initial obligation was not reasonable (*Spevack* v. *Klein, supra*). These consequences do not constitute an impermissible burden on the privilege against self-incrimination. Unlike a policeman whose refusal to waive immunity would have resulted in the loss of his profession, his career and his livelihood, and unlike an attorney whose refusal to answer questions would have resulted in the loss of license, the means by which he practices his profession and earns his living,* the contractor loses, for a limited period of time, certain but by no means all of his business opportunities. See *Minor* v. *United States,* 396 U.S. 87 (1969). His license

---

* Indeed, there is some authority for the proposition that public employment and, to an important degree, licensure are rights. See *e.g. Konigsberg* v. *State Bar,* 366 U.S. 36 (1961); 73 Col. L. Rev. 882 (1973). No such claim can be made for the contractor.

is unaffected; he may continue to practice his profession. *Zwick* v. *Freeman*, 373 F.2d 110 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967). The consequences are lightened even further by the fact that any firm, partnership or corporation may petition to remove the disqualification on the grounds *inter alia* that he cooperated with the investigation and that the person refusing to waive immunity had a degree of financial interest in the firm such that it would not be in the public interest to cancel the contract or continue the disqualification. N. Y. General Municipal Law, § 103-c; N. Y. Public Authorities Law, § 2603.

Third, unlike the relationship of the licensee and the public employee to government, the contractor's affiliation with government is episodic, each episode being defined by a set of pre-consented rules. Accordingly, the statutes at issue, by their limitation to "contracts and transactions had with" the State, provide a much more circumscribed area of permissible questioning than did the analogous § 1123 of the New York City Charter involved in *Gardner* v. *Broderick*, *supra*, and in *Uniformed Sanitation Men* v. *Commissioner of Sanitation*, 392 U.S. 280 (1968) which required any "councilman or other officer or employee of the city" to "answer any question regarding the property, government or affairs of the city or of any county included within its territorial limit, or regarding the nomination, election, appointment or official conduct by any officer or employee of the city or of any such county". See *Gardner* v. *Broderick*, supra at 275 n. 3.

With a statute so broad in scope, this Court rejected the procedure of requiring a previous waiver of immunity but said that if Gardner had:

> "... refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity*

v. *New Jersey, supra,* the privilege against self-incrimination would not have been a bar to his dismissal." *Gardner* v. *Broderick, supra,* at 278.*

In the case of contractors, the statutory language coupled with the contracts makes the asking of specific questions unnecessary to limit the scope of the inquiry to bounds consistent with the scope of the obligation of candor and a prior waiver is permissible.**

---

* There are some textual difficulties with this paragraph which is the heart of the *Gardner* decision. In stating that the privilege would not have been a bar to dismissal for refusal to answer specific questions, it seems fairly clear that the opinion means that invocation of the privilege would not bar dismissal. The problem arises when the opinion states that this is so if the officer is not "required to waive his immunity with respect to the use of the answers or the fruits thereof in a criminal prosecution of himself, *Garrity* v. *New Jersey, supra.*" There are two possible interpretations of this clause. The first is that, under the circumstances of that case, the officer could not be required to waive immunity in advance of the questions being asked. The second is that any answers he in fact gave would not be admissible in any criminal prosecution and that invocation of the privilege would not, therefore, bar his dismissal. The first interpretation is the sounder. It is consistent with the facts of *Gardner* and with the problems generated by the extremely broad language of § 1123. The second interpretation is less sound because, although the clause cites *Garrity* v. *New Jersey,* no questions were asked or answered in *Gardner* and, more important, if any answers could not be used in a prosecution, the public employee, whose high obligation of candor the Court acknowledged, would be in no different position from any other member of the public who must testify if his testimony cannot be used in a criminal prosecution. Under the second interpretation, the language in *Gardner* respecting the obligation of the public employee would have been mere surplusage. See also *Uniformed Sanitation Men* v. *Commissioner of Sanitation, supra,* at 294-85 (1968) presenting the same ambiguity as *Gardner.*

** It may be noted that the waivers which appellees were asked to sign did not refer to the scope of the inquiry. Appellees, however, have never suggested that they did not know why they were called or that they did not know the scope of the permissible inquiry.

Under these circumstances, suspension from public contracting is a proper and reasonable implementation of the duty to regulate contractor responsibility. *United States* v. *Acme Process Co., supra.* Certainly, if appellees were private contractors they could not withhold even incriminating information from the persons with whom they contracted and expect to have the contract continue or to receive business from the same source in the future. Similarly, it is reasonable for the State to seek information, even incriminating information, from their contractors. If contractors do not wish to cooperate, their privilege against self-incrimination assures that they need not do so. But there should be no further obligation on the part of the State to use and to pay for the services of contractors who will not be candid with it.

The foregoing assumes that, in evaluating whether or not the privilege against self-incrimination has been burdened or impermissibly burdened, the evaluation is achieved by a balancing of the relevant factors. Underlying the approach of the District Court is an implicit assumption that no such balancing takes place. The assumption is untenable. The most appropriate analogy is to those cases dealing with whether or not the privilege may be invoked at all in instances where the material sought does have incriminating potential. As this Court has stated:

> "Tension between the State's demand for disclosure and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly."
>
> "An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of

consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollutants discharged in our waters and atmosphere. Comparable examples are legion." *California* v. *Byers*, 402 U.S. 424, 427-28 (1971) (footnote omitted).

Byers itself involved California's "hit and run" statute requiring a motorist involved in an accident to stop and identify himself. See also *United States* v. *Fratello*, 44 F.R.D. 444, 450 (S.D.N.Y. 1968); *State* v. *Falco*, 60 N.J. 570, 292 A. 2d 13 (1972).

The circumstances under which potentially incriminating evidence may be required depend on the substantiality of the risk involved balanced against the interest in disclosure. *California* v. *Byers, supra; Marchetti* v. *United States*, 390 U.S. 62 (1968); *Albertson* v. *SACB*, 382 U.S. 70 (1965). Nor should it be overlooked that failure to produce even potentially incriminating, but required, evidence will have serious consequences. *California* v. *Byers, supra;* see *United States* v. *Kordel*, 397 U.S. 1 (1970). If the privilege itself is subject to a balancing rationale, any consequences of asserting the privilege should be subject to the same rationale and the elements of the balance should be the severity of the consequences weighed against the interest in unconditioned disclosure. See *Napolitano* v. *Ward*, 317 F. Supp. 83, 84 (N.D. Ill. 1970). This approach has been, in fact, the one taken by this Court in declining to lay down an absolute rule in *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956) and in differentiating between what can be required of a public employee as distinguished from a licensee. *Gardner* v. *Broderick, supra; Spevack* v. *Klein, supra.* Application of this rationale to

public contractors should yield a result in favor of the New York approach struck down by the Court below.

The result is no different if the case is examined under what might be termed the metaphorical approach of the "rock and the whirlpool". *Garrity* v. *New Jersey, supra.* In the first place, the contractor, far more than the employee and licensee, has a clear chart of the waters ahead and may choose not to enter them by not bidding. The channel for the employee and the licensee is much longer and far murkier beginning when the relationship is entered into perhaps many years before and clouded by the uncertain shape of the information which may be demanded. And, should the contractor run afoul of either rock or whirlpool, he may nevertheless emerge, if not unscathed, at least far from scuttled and certainly sufficiently intact to keep afloat. The contract is the Argo of the contractor.

In short, the colorful dilemma which appellees may be expected to posit for themselves is as mythological as Scylla and Charydbis. That some dilemma may exist for contractors is clear. But not every dilemma is unconstitutional. The Constitution does not guarantee against hard choices even for those who contract with the government. See *Williams* v. *Florida*, 399 U.S. 78, 84 (1970); *Silverio* v. *Municipal Court*, 355 Mass. 623, 247 N.E. 2d 379, *cert. denied* 396 U.S. 878 (1969).

Nor should the State be required to calm the waters further. Its dilemma is more serious than that of the contractor. Under the result below, the State must either grant immunity to secure an accounting or it must forego an accounting.* The dilemma for both parties is created

---

* The dilemma is particularly acute in New York because New York law accords automatic transactional immunity. N. Y. Criminal Procedure Law, § 190.40. Indeed, the Court below failed to explore the scope of the waiver of immunity sought by the statutes all of which refer only to a "waiver of immunity from prosecution'" (N. Y. General Municipal Law; §§ 103-a, 103-b; N. Y. Public

(footnote continued on following page)

by the relationship itself. For those citizens from whom no special accounting is owed to the State (and from whom the State has no special obligation to the public to exact an accounting), no dilemma exists. Where the special relationship exists, however, an unconditioned accounting must be available *to the extent of the relationship.* Appellees cannot be required to account for activities unrelated to their contracts but they must account for those contracts or forego them and the economic benefit they entail. For again it must be remembered that, like other citizens, appellees are not required to render an account. *Wyman* v. *James, supra.* But failure to do so must sever both the special relationship and its benefits. Any other result would deny the higher obligation of the contractor. Cf. *Garner* v. *Broderick, supra.*

POINT II

The decision below is not supported by the record.

The District Court enjoined the enforcement of N. Y. General Municipal Law, §§ 103-a and 103-b and N. Y. Public Authorities Law, §§ 2601 and 2602 "until rewritten." On the record before the Court, this broad result was unwarranted.

First, the complaint stated that appellees were members of a partnership which had "various contracts" with Erie County. At no time did appellees allege that they as in-

---

(footnote continued from preceding page)

Authorities Law, §§ 2601, 2602) and do not refer to use immunity. See *Zicarelli* v. *New Jersey State Comm.*, 406 U.S. 472 (1972). See, too, the opinion of the New York Court of Appeals in *Gardner* v. *Broderick*, 20 N.Y. 2d 227, 230, 229 N.E. 2d 184 (1967), *reversed* 392 U.S. 278 (1968). The New York Court of Appeals has not interpreted the statutes in question since this Court declined to pass on their validity in *George Campbell Painting Corp.* v. *Reid*, 392 U.S. 286 (1968) although such a case is presently pending in that Court. *People* v. *Avant*, 39 A.D. 2d 389, 334 N.Y.S. 2d 768 (3rd Dept. 1972), appeal pending.

dividuals had existing contracts with the County of Erie when they were subpoenaed to appear. Accordingly, any threatened cancellation of existing contracts did not burden appellees' privilege against self-incrimination. See *George Campbell Painting Corp.* v. *Reid,* 392 U.S. 286 (1968). Whatever the impact of the future disqualification of appellees as individuals,* any existing contracts with their partnership may be cancelled.

This failure to distinguish between the contracting partnership and the individual appellees (see *United States* v. *Kordel,* 397 U.S. 1 [1970]), coupled with the District Court's broad directive to redraft the challenged statutes, creates the danger that corporations may be included in the Court's holding. Such a result has nothing to commend it, and if it had ever been intended by this Court *George Campbell Painting Corp.* v. *Reid, supra,* would not have been affirmed and *Holland* v. *Hogan,* 392 U.S. 654 (1968) would not have been remanded for reconsideration. (Contrast, *Perla* v. *New York,* 392 U.S. 296 [1968] with *Holland* v. *Hogan, supra.*) Corporations cannot avoid the statutory consequences of an officer's invocation of the privilege against self-incrimination, *United States* v. *Kordel, supra.*

---

* The allegation that appellees wish in the future to secure public contracts may well not be sufficient to establish a present controversy since they do not indicate whether they have bid or are about to bid on any contracts and there is no indication that any bid they submit or could submit would be the low bid on any such contract. *Golden* v. *Zwickler,* 394 U.S. 103 (1969).

CONCLUSION

The Decision below should be reversed and the complaint dismissed.

Dated: New York, New York, June 13, 1973.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants
Lefkowitz and Rockefeller

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BRENDA SOLOFF
Assistant Attorney General
Of Counsel

APPENDIX

GENERAL MUNICIPAL LAW

Section 103-a. Ground for cancellation of contract by municipal corporations and fire districts:

A clause shall be inserted in all specifications or contracts made or awarded by a municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or by a fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, for work or services performed or to be performed, or goods sold or to be sold, to provide that upon the refusal of a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation, or fire district, or any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any municipal corporation or any public department, agency or official

thereof on or after the first day of July, nineteen hundred fifty-nine or with any fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, by such person, and by any firm, partnership, or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the municipal corporation or fire district without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the municipal corporation or fire district for goods delivered or work done prior to the cancellation or termination shall be paid.

The provisions of this section as in force and effect prior to the first day of September, nineteen hundred sixty, shall apply to specifications or contracts made or awarded by a municipal corporation on or after the first day of July, nineteen hundred fifty-nine, but prior to the first day of September, nineteen hundred sixty.

Section 103-b. Disqualification to contract with municipal corporations and fire districts:

Any person, who, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department,

agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership, or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

PUBLIC AUTHORITIES LAW

Article 9—General Provisions

(Title 3-A—Contracts of Public Authorities)

Section 2601. Ground for cancellation of contract by public authority:

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority or by any official of any public authority created by the state or any political subdivision, for work or services performed or to be performed or goods sold or to be sold, to provide that upon the refusal by a persn, when called before a grand jury, head of a state depatment, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any public authority or official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of

which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the public authority for goods delivered or work done prior to the cancellation or termination shall be paid.

Section 2602. Disqualification to contract with public authority:

Any person who, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director, or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is

known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York, or the commissioner of general services as the case may be, and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-331

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER, B. JOHN TUTUSKA,
Appellants,

vs.

M. RUSSELL TURLEY, ROBERT H. STIEVATER,
Appellees.

APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE U. S. DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT B. JOHN TUTUSKA

JAMES L. MAGAVERN,
Erie County Attorney,
Attorney for Appellant Tutuska,
Office and Post Office Address,
25 Delaware Avenue,
Buffalo, New York 14202.

JAMES L. MAGAVERN,
BRUCE A. GOLDSTEIN,
On the Brief.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

II.

CITATIONS.

IN THE

Supreme Court of the United States

October Term, 1972

No. .....

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER, B. JOHN TUTUSKA,

Appellants,

VS.

M. RUSSELL TURLEY, ROBERT H. STIEVATER,

Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT B. JOHN TUTUSKA

Opinion Below

The opinion of the three man United States District Court sitting in the Western District of New York was rendered on April 28, 1972, and is set out in the record.

Jurisdiction

Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253.

Statutes Involved

The provisions of law involved in this case are: the Fifth and Fourteenth Amendments of the United States Constitution and Sections 103-a and 103-b of the New York General Municipal Law and Sections 2601 and 2602 of the New York Public Authorities Law. Because of their length, the texts of those provisions are set out in Appendices A, B and C to this Brief.

Question Presented

Insofar as relevant to the present case, Section 103-a of the New York General Municipal Law provides that in any contract for goods or services awarded by a municipal corporation a clause shall be included to the effect that upon the refusal of the contractor (or a member, partner, director or officer of the contractor) when called before a grand jury to testify concerning any contract or transaction with a public entity or to waive immunity against subsequent criminal prosecution, any outstanding public contracts of the contractor may be cancelled and the contractor shall be disqualified from bidding on public contracts for a period of five years. The question presented in this case is whether the statutorily-required contractual provision is constitutionally valid as applied to architects who had entered into a contract for services to Erie County containing such a clause but later declined to waive immunity in a grand jury investigation of corruption in transactions with the County.

Statement of the Case

Respondents are architects who were parties to public contracts with various governmental entities within the State of New York. In February, 1971, Respondents were subpoenaed to appear before an Erie County Grand Jury which was investigating corruption in certain transactions with the County. At the time of their appearance they were requested to sign a waiver of immunity from subsequent criminal prosecution but declined to do so.

Section 103-a of the New York General Municipal Law requires every municipal contract for goods or services to contain a clause providing that refusal by the contractor (or a member, partner, director or officer of the contract) when called before a grand jury to testify or to sign a waiver of immunity against criminal prosecution concerning contracts or transactions with public agencies will be grounds for cancellation of outstanding municipal contracts and disqualification as a bidder on municipal contracts for five years thereafter. Section 103-b of the General Municipal Law provides for such disqualification without reference to the required contractual clause. Sections 2601 and 2602 of the New York Public Authorities Law impose similar requirements, with some minor differences not relevant to the present case, in respect to contracts with public authorities. See also New York State Finance Law, Sections 139-a and 139-b.

Respondents brought suit seeking both a declaratory judgment that the statutory provisions for cancellation and disqualification were violative of their Fifth Amendment rights and a permanent injunction against enforcement of the statutes. A three-judge court was convened and on April 28, 1972, ordered the relief sought by appellees. This is an appeal from that order.

Summary of Argument

In a series of recent decisions, this Court has established that a public employee cannot be discharged for invoking his privilege against self-incrimination and refusing to testify about his conduct in office without immunity from criminal prosecution. The question in the present case is whether that principle should be extended to public contractors. We submit that the principle should not be so extended. The validity of a requirement that a person waive his privilege against self-incrimination as a condition to eligibility for contractual relations with public entities must logically and necessarily be judged by a balancing test. A statutory requirement that public contracts contain a provision that refusal to waive immunity shall be ground for cancellation of outstanding public contracts and disqualification from public contracts for a period of five years represents a reasonable balance between public interest in the integrity of the contracting process and the interests of the individual against self-incrimination. The requirement does not constitute an unreasonable condition to the public contract relationship and therefore is not unconstitutional.

POINT I

The constitutionality of the statutory conditions to public contracts is to be determined by a balancing test.

This case presents essentially a question of the constitutionality of a condition to the enjoyment of a public benefit. During the last two decades, this Court has developed a considerable but still incomplete body of doctrine in relation to "unconstitutional conditions". The earlier notion, predicated on the right-privilege distinction, that public employment and other benefits extended by government,

since they might be withheld altogether, could validly be made subject to any conditions which the State might choose to impose has been abandoned. The classic statement of that idea is found in the dictum of Mr. Justice Holmes in *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N. E. 517:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

The evolution of the doctrine of unconstitutional conditions has taken place both in cases involving First Amendment freedoms and in cases involving the Fifth Amendment privilege against self-incrimination. In *Weiman v. Updegraff*, 344 U. S. 183 (1952), the Court held unconstitutional an Oklahoma statute which required every state employee, as a condition of employment, to execute an oath to the effect that he was not affiliated with any organization which had been listed by the United States Attorney General as subversive. The Court held:

> "Under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. * * * Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process" (344 U. S. at 190-191).
>
> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory" (344 U. S. at 192).

In subsequent cases, the Court established a stricter standard of review of conditions to public employment

which restrict First Amendment freedoms, examining them not merely to determine whether they are "patently arbitrary or discriminatory," but subjecting them to a rigorous balancing test. In *Shelton v. Tucker,* 364 U. S. 479 (1960), the Court declared unconstitutional an Arkansas statute which required every teacher, as a condition to employment in a state-supported school or college, to file annually an affidavit listing every organization to which he had belonged or regularly contributed within the preceding five years. The Court held:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose" (364 U. S. at 488).

The balancing process was made even more explicit in *Pickering v. Board of Education,* 391 U. S. 563, 568 (1967), in which the Court, in an opinion holding unconstitutional the dismissal of a public school teacher for a public letter critical of the Board of Education, framed the issue as follows:

> "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. *Keyishian v. Board of Regents, supra* [385 U. S. 589 (1967)] at 605-606. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

In the decisions concerned with conditions to employment whose effect is to restrict the privilege against self-incrimination, as distinguished from freedom of association and expression, the reasoning and language of the Court have not been so carefully refined. In *Garrity v. New Jersey,* 385 U. S. 493 (1967), the Court reversed the conviction of municipal police officers based upon self-incriminating statements they had given under circumstances where refusal to speak would have entailed the loss of their jobs. Referring to the dictum of Mr. Justice Holmes in *McAuliffe v. New Bedford* quoted above, the Court held:

> "The question in this case, however, is not cognizable in those terms. Our question is whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee."
>
> * * *
>
> "We conclude that policemen, like teachers and lawyers are not relegated to a watered-down version of constitutional rights."
>
> * * *
>
> "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."

In *Gardner v. Broderick,* 392 U. S. 273 (1968), the Court held that dismissal of a police officer solely for refusal to waive immunity in a grand jury proceeding would violate his constitutional privilege against self-incrimination. The Court held:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to

the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra,* the privilege against self-incrimination would not have been a part to his dismissal.

"The facts of this case, however, do not present this issue. Here, petitioner was summoned to testify before a grand jury in an investigation of alleged criminal conduct. He was discharged from office, not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. He was dismissed for failure to relinquish the protections of the privilege against self-incrimination. The Constitution of New York State and the City Charter both expressly provided that his failure to do so, as well as his failure to testify, would result in dismissal from his job. He was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege."

In *Sanitation Men v. Sanitation Commissioner,* 392 U. S. 28 (1968), decided the same day as *Gardner v. Broderick,* the Court held that petitioners had been wrongfully discharged as sanitation employees, in violation of their constitutional privilege, for refusal to testify before the New York City Commissioner of Investigation in an investigation of charges of official misconduct. In the majority opinion, it was reasoned:

"But here the precise and plain impact of the proceedings against petitioners as well as of § 1123 of the New York Charter was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. *Gardner v. Broderick, supra; Garrity v. New Jersey, supra. Cf. Murphy v. Waterfront Commission,* 378 U. S. 52, at 79 (1964). At the same time, petitioners, being public employees, subject themselves to

dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."

The above-quoted language in *Garrity*, *Gardner*, and *Sanitation Men*, could be taken, on its face, to mean that no conditions can be attached to public employment that could not be imposed directly upon private citizens through the police power. We submit, however, that no such sweeping effect was or could have been intended. To reduce the proposition to absurdity, a public employee could hardly argue that he cannot be discharged for failure to report regularly to his place of work simply because he cannot constitutionally be imprisoned without arrest on probable cause or conviction of a crime. The absolute and facile right-privilege doctrine has been rejected. It should not be replaced by an equally absolute and facile doctrine of unconstitutional conditions that refuses to recognize legitimate public interests in the relationship to which the condition attaches. As stated by Professor Van Alstyne:

> "The basic flaw in the doctrine is its assumption that the same evil results from attaching certain conditions to government-connected activity as from imposing such conditions on persons not connected with government."
>
> • • •
>
> ". . . the weakness of the unconstitutional conditions doctrine was that in its very ease of application it failed to attach any significance to the legitimate public purposes which any regulation might serve. In contrast *Shelton v. Tucker* quite carefully focuses on the competing interests involved." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harvard Law Review 1439, 1448, 1451 (1968).

Professor Van Alstyne's point has been explicitly recognized in a passage already quoted from a First Amendment case, *Pickering v. Board of Education, supra:*

> "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

If restriction of First Amendment freedoms by conditions to public employment are subject to a balancing test, then it is difficult to see why the Fifth Amendment privilege against self-incrimination should not be; certainly it does not stand on any higher constitutional plane. As recently as *Cohen v. Hurley,* 366 U. S. 117 (1961), which was overruled in 1966 by *Spevack v. Klein,* 385 U. S. 511 (1967), the self-incrimination clause was held not applicable to the states through the Fourteenth Amendment. We submit that conditions to public employment whose effect is to restrict the privilege against self-incrimination—like those whose effect is to restrict First Amendment freedoms—are subject to a balancing test and that the rather broad language of some of the recent decisions was intended only to establish that public employees enjoy the protection of the Bill of Rights and may not be deprived of those rights simply because the restriction is framed as a condition to employment rather than as a police power regulation.

POINT II

As judged by a balancing test, the statutory provisions for cancellation and disqualification from bidding are not unreasonable conditions to public contracts and do not violate the privilege against self-incrimination.

The statutory provisions under review in the present case impose conditions to public benefits that are quite different from those rejected by the Court in *Gardner, Sanitation Man, and Garrity.* Considering both the public interest in the condition and its impact upon individual rights, a balancing of the competing interests at stake results in an opposite conclusion.

Considering first the public interest in the condition, it is to be noted that Appellees, precisely because they are not in an employment or master-servant relationship with a public entity, are subject to relatively little control in the performance of their public duties. In the employment relationship, the employee is subject to detailed, day-to-day supervision and control; and the public employer has reasonably adequate opportunities to safeguard against misconduct and protect the public interest. In contrast, an independent contractor enjoys a high degree of autonomy in the performance of his contractual public obligations and the opportunity of government to assure the proper performance of those obligations through non-criminal means is correspondingly restricted. (Moreover, many public contracts—though not those for architectural services—must be awarded through competitive bidding, and government has very little discretion in its choice of the contractor.) If the public is to be assured of the integrity and efficiency of the services it performs through contracts, the contractor must be held accountable to free

disclosure, and, if guilty of criminal misconduct, to appropriate sanctions. Five years is a reasonable period in which to complete an investigation. Disqualification for that period is a reasonable means to protect the contracting process against a contractor unwilling freely to account for his dealings with the public.

Considering the impact upon the individual, it may be noted that in each of the public employment cases, the sanction imposed for refusal to testify was loss of livelihood. The severity of that sanction was stressed in the opinions of the Court. In *Garrity*, the Court viewed the problem as one of the voluntariness of self-incriminating statements made by the police officers and observed:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."

Similarly in *Spevack v. Klein*, 385 U. S. 511 (1967), which held the self-incrimination clause of the Fifth Amendment applicable to the states by reason of the Fourteenth and reversed a judgment disbarring a lawyer for refusing to testify in proceedings brought against him for professional misconduct, the Court stressed:

> "the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it [the privilege against self-incrimination]".

Spevack v. Klein is also distinguishable from the present case on grounds noted by the Court in *Gardner v. Broderick*, *supra* at 278:

> "Unlike the lawyer who is directly responsible to his client, the policeman is either responsible to the State or to no one".

In *Spevack*, the State was acting in a regulatory or police-power capacity. To allow it to require a waiver of the privilege against self-incrimination in the exercise of its regulatory capacity would be to open the door to a potentially unlimited abrogation of the privilege. In contrast, to allow the state to require an accounting by its contractors, without grant of immunity, as a condition to further eligibility as a contractor does not entail that unlimited possibility and does not result in consequences different from those likely to occur within the private sector.[1]

In the present case, the sanction is not loss of an entire livelihood but only of public contracts and only for a period of five years. Public entities may be an important source of business for professional architects. They are not, however, the sole source of business. Since each contract is an independent transaction, disqualification from bidding for a period of five years does not impair future contracts and does not disrupt a continuing and exclusive relationship.[2] Appellees can continue their livelihood, subject only to a five year disqualification from public contracts. The consequence of refusal to waive the privilege against self-incrimination is far less severe than the loss of livelihood on which *Gardner*, *Sanitation Men*, *Spevack*, and *Garrity* were predicated. (We recognize that the impact

---

[1] *Cf. The Supreme Court, 1967 Term*, 82 Harvard Law Review 63 at 209: "the Court's distinction between employees and licensees may reflect the tradition of allowing the government freedom approaching that of a private employer when dealing with its employees while holding it to a stricter standard when its interest is regulatory in nature".

[2] We assume that the statutes in question would not be construed so as to permit the contractor to be called again to testify on the same subject at the end of the five year disqualification period and then subjected to a further five year disqualification. It may be noted that excepting for "class A" felonies, comprising murder, kidnapping, and first degree criminal possession and first degree criminal sale of dangerous drugs, the statute of limitations for felonies in New York State is five years. N. Y. Criminal Procedure Law § 30.10.

in any individual case will depend upon its particular circumstances. But we submit that constitutional principles of this kind should be based upon a determination of their probable general impact and that the impact of the condition as attached to public contracts will in general be significantly less restrictive of individual rights than as attached to public employment.)

The privilege against self-incrimination does not protect against all adverse consequences from a refusal to testify; it protects only against criminal prosecution. In *Ullmann v. United States*, 350 U. S. 422 (1955), the Court in sustaining the validity of the Immunity Act of 1954, rejected the claim that a witness who had been granted immunity against subsequent criminal prosecution could refuse to testify on the ground that his testimony might lead to loss of employment, general public opprobrium and other seriously adverse effects upon his economic and social position. In language recently quoted with approval in *Kastigar v. United States*, 406 U. S. 441 (1972), the Court stated as to the privilege:

> "that its sole concern is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of penalties affixed to criminal acts." (350 U. S. at 438-439)

The same principle is expressed in the caveat stated in *Gardner v. Broderick, supra* at 278:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra*, the privilege against self-incrimination would not have been a bar to his dismissal."

In the case of a public employee, it appears that the employee may be compelled to testify against himself on pain of losing his job only if he is not at the same time required to waive immunity. For the reasons already stated, however, we submit that in the case of a public contractor, the state should not be required, in order to oblige him to account for the performance of his contractual obligations, to grant him immunity from criminal prosecution and thereby to forego recourse to the criminal sanctions designated to maintain the integrity of the contracting process. If a contractor is unwilling without immunity to account for his actions in relation to his dealings with public agencies, then it is not unreasonable to cancel his contract and disqualify him from bidding on public contracts for a period of five years.

It is to be noted that the effect of the statutory conditions is not in itself to compel the contractor to waive immunity. He cannot be compelled by sanctions of contempt or criminal penalties to testify against himself. The effect is only to provide that if he refuses to testify without requiring the state to forego its normal criminal remedies he may be disqualified for a period of five years. We submit that that is not an unreasonable condition to a public contract and that it does not unconstitutionally deprive Appellees of their constitutional privilege.

Conclusion

For the reasons stated, the judgment should be reversed.

Respectfully submitted,

JAMES L. MAGAVERN,
Erie County Attorney,
Attorney for Appellant Tutuska,
Office and Post Office Address,
7th Floor—Erie County Hall,
25 Delaware Avenue,
Buffalo, New York 14202.

JAMES L. MAGAVERN and
BRUCE A. GOLDSTEIN,
on the Brief.

APPENDIX A

Constitution of the United States

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the *privileges or immunities of citizens of the United States;* nor shall any *State* deprive any person of life, liberty, or property, *without due process of law;* nor deny to any person within its jurisdiction *the equal protection of the laws.*

APPENDIX B

New York General Municipal Law

§ 103-a. Ground for cancellation by municipal corporations and fire districts.

A clause shall be inserted in all specifications or contracts made or awarded by a municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or by a fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, for work or services performed or to be performed, or goods sold or to be sold, to provide that upon the refusal of a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract,

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or any public department agency or official thereof, for goods,

work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or with any fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, by such person, and by any firm, partnership, or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the municipal corporation or fire district without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the municipal corporation or fire district for goods delivered or work done prior to the cancellation or termination shall be paid.

The provisions of this section as in force and effect prior to the first day of September, nineteen hundred sixty, shall apply to specifications or contracts made or awarded by a municipal corporation on or after the first day of July, nineteen hundred fifty-nine, but prior to the first day of September, nineteen hundred sixty. As amended L. 1968, c. 1032, § 1; L. 1970, c. 694, § 4; L. 1971, c. 268, §4, eff. May 18, 1971.

§ 103-b. Disqualification to contract with municipal corporations and fire districts.

Any person who, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department or other city agency,

which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer and any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the organized crime task force in the department of law, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York and the appropriate departments, agencies and officials of the state,

political subdivision thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

As amended L. 1968, c. 420, § 125; L. 1968, c. 1032, § 2; L. 1970, c. 694 § 5; L. 1971, c. 268, § 5, eff. May 18, 1971.

APPENDIX C

New York Public Authorities Law

§ 2601. Ground for cancellation of contract by public authority.

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority or by any official of any public authority created by the state or any political subdivision, for work or services performed or to be performed or goods sold or to be sold, to provide that upon the refusal by a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract,

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any public authority or official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the public authority for goods delivered or work done prior to the cancellation or termination shall be paid. As amended L. 1970, c. 694, § 7; L. 1971, c. 268, § 7, eff. May 18, 1971.

§ 2602. Disqualification to contract with public authority.

Any person, who, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant questions concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a

period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the organized crime task force in the department of law, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York, or the commissioner of general services as the case may be, and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry.

Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

As amended L. 1970, c. 694; L. 1971, c. 268, § 8, eff. May 18, 1971.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-331

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER, B. JOHN TUTUSKA,

Appellants,

against

M. RUSSELL TURLEY and ROBERT H. STIEVATER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT

BRIEF FOR APPELLEES

RICHARD O. ROBINSON
ROBINSON & SPELLER,
Attorneys for Appellees,
606 Liberty Bank Building,
Buffalo, New York 14202.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX TO BRIEF.

TABLE OF CASES.

II.

STATUTES.

CONSTITUTION.

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-331

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER, B. JOHN TUTUSKA,

Appellants,

against

M. RUSSELL TURLEY and ROBERT H. STIEVATER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT

BRIEF FOR APPELLEES

Questions Presented for Review

The questions presented for review are whether a state may impose a condition upon public contractors requiring them to waive their constitutional privilege against self-incrimination concerning matters not narrowly limited to the public contract and whether public contractors may be penalized for refusing to execute a waiver of immunity covering testimony not narrowly limited to the public contract.

Statement of the Case

Appellees architects were parties to a public contract with the County of Erie, New York and after having been subpoenaed before an Erie County Grand Jury in February, 1971, they were each individually presented with so-called "waivers of immunity" which each read, in part, as follows:

> "I have been advised by District Attorney John J. Honan that the Grand Jury of the County of Erie, now in session, is investigating charges of Conspiracy (Sections 105.00, 105.05, 105.10, 105.15 of the Penal Law); Bribery (Sections 200, 200.10, 200.20, 200.30, 200.35, 200.45, 200.50 of the Penal Law); Larceny (Article 155 of the Penal Law), and other matters of every nature whatsoever appertaining thereto. I am further advised that such charge and investigation may involve me.
>
> No one has made any threats or promises to me whatsoever in connection with my appearance or any testimony that I may give before the Grand Jury. I have also been advised by John J. Honan that anything I may say or testify to before said Grand Jury in said investigation can be used against me on the prosecution of any charge or indictment concerning the transactions about which I may testify.
>
> And, with full understanding of my declarations herein, and of my own free will, I hereby expressly waive any immunity that might otherwise come to me because or on account of my appearance or any testimony that I may give before said Grand Jury in connection with said investigation." Appendix 16-18.

Appellees refused to execute the waivers presented and are now subject to cancellation of existing contracts with municipalities and are disqualified from public contracting for a period of five (5) years pursuant to New York General Municipal Law, Sections 103-a and 103-b and Public Authorities Law, Sections 2601 and 2602. Appendix 60-64.

A three-judge District Court in the Western District of New York has held the aforementioned statutes unconstitutional and has enjoined appellants from their further enforcement. Appendix 59.

Summary of Argument

While it is self-evident that compulsory waiver of immunity is an abridgment of the constitutional right against self-incrimination, this Court has held that a state may have a compelling overriding interest which may limit such constitutional right.

Nevertheless, the statutes in question penalize refusal to broadly waive immunity in criminal proceedings and effectively seek to compel self-incriminating testimony beyond the scope of the public contract. This unspecific and broad limitation on constitutional rights is impermissible.

POINT I

The statutes are overbroad in their limitation upon the exercise of the constitutional right against self-incrimination.

Because appellees refuse to waive constitutionally protected rights against self-incrimination, they have been penalized by disqualification to contract with the governmental units for a period of five (5) years and were made subject to concellation of all existing contracts.

Appellees do not argue here that the State does not have an interest in questioning its employees and private contractors. *Garner v. Los Angeles Board*, 341 U. S. 716, 720 (1951); *Slochower v. Board of Education*, 350 U. S. 551, 559 (1956). But they do claim precisely the same rights as the police officers and sanitation workers in *Gardner v.*

Broderick, 392 U. S. 277 (1968) and *Uniformed Sanitation Men's Association v. Commissioner of Sanitation*, 392 U. S. 280 (1968), that is, that the State may not impose "costly" consequences for assertion of constitutionally protected rights. *Malloy v. Hogan*, 378 U. S. 1, 8 (1964).

There is no doubt that at least a plurality of this Court has adopted a so-called "balancing test" by which limitations on constitutional protections may be imposed by the State in favor of overriding State's interests, particularly with respect to the right against self-incrimination:

> "Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably, these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protection on the other; neither interest can be treated lightly." *California v. Byers*, 402 U. S. 424, 427-28 (1971).

Assuming, then, that constitutionally protected rights may be limited in some fashion by the "State's demand for disclosures", such rights should not nevertheless be indiscriminately cast aside:

> "* * * When two principles come in conflict with each other, the Court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded * * *." *United States v. Burr*, 25 Fed. Cases 38, 39 (Cir. Ct. D. Va. 1807).

In *Gardner, supra*, this Court clearly showed the way that both the interests of the State and the rights of the

individual might be, in the judgment of the Court, preserved to a reasonable extent by holdnig that the State may question employees about their "official duties" in which case "the privilege against self-incrimination would not be a bar to [their] dismissal". *Gardner, supra* at 278.

This was expanded upon in *Uniformed Sanitation Men's Association v. Commissioner of Sanitation, supra* at 284-285 quoted in the opinion below, Appendix 58-59:

> "As we stated in *Gardner* * * *, if New York had demanded that petitioners answer questions specifically, directly and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against petitioners * * * was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners, as public employees, are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incimination. * * * At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."

The waivers of immunity offered in this case were not limited to the narrow issues relating to the contract, nor do the statutes in question in any way limit the breadth of the waivers which may be coercively demanded. They simply require a potential defendant "to sign a waiver of immunity against subsequent criminal prosecution." N. Y. General Municipal Law, Sections 103-a, 103-b; General Municipal Law, Sections 2601, 2602. Appendix 10-16 and

60-64. Nowhere in New York State statutes is the term "waiver of immunity" limited, much less defined. Therefore, there is no "fairly possible" construction which might be deemed to bring the terminology "waiver of immunity" within permissible limitations. *United States v. Thirty-Seven Photographs*, 403 U. S. 363, 369 (1971).

Nor is it appropriate for appellants to argue that appellees could have been required to testify under threat of penalty of loss of present and future public contracts under a more narrowly drawn statute. It is not necessary for appellees in attacking overly broad statutes to show that their own conduct could not have been regulated by a statute drawn with requisite narrow specificity. *Dombrowski v. Pfister*, 380 U. S. 479, 486 (1965); *Gooding v. Wilson*, 405 U. S. 521 (1972); and see *Coates v. City of Cincinnati*, 402 U. S. 611, 614 (1971).

The fact is that this Court has consistently required statutes which limit constitutional rights to be reasonably limited to their legitimate purposes:

> "In a series of decisions, this Court has held, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U. S. 479, 488 (1960).

See also *Keyishian v. Board of Regents*, 385 U. S. 589, 602 (1967).

This limitation upon abridgment of constitutional rights beyond that reasonably necessary for legitimate purposes is not restricted to the area of First Amendment freedoms.

This Court in this term has struck down a provision in the New York Civil Service Law prohibiting employment of aliens in competitive civil service positions as violative of the equal protection provisions of the Fourteenth Amendment, although acknowledging the right of the State to impose some restrictions on the employment of non-citizens if "narrowly confined". *Sugarman v. Dougal*, ___ U. S. ___ (June 25, 1973).*

Note that it was upon this point, that is the failure of the New York City Charter Provisions to narrowly limit their restriction upon the exercise of the privilege against self-incrimination, that the full court concurred in *Gardner v. Broderick, supra* and *Uniformed Sanitation Men's Association v. Commissioner, supra*, after the previously divided opinions in *Spevack v. Klein*, 385 U. S. 511 (1968) and *Garrity v. New Jersey*, (385 U. S. 493):

> "• • • I find in these opinions a procedural formula whereby, for example, public officials may now be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices. I add only that this is a welcome breakthrough in what *Spevack* and *Garrity* might otherwise have been thought to portend." *Gardner v. Broderick, Uniformed Sanitation Men's Association, Inc. v. Commissioner of Sanitation, supra*, 285

Appellants argue that an agreement to waive immunity should be read into the contracts, even though the record

---

* That decision also reaffirmed the Court's position that "• • • [T]his Court now has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege'. [*Graham v. Richardson*] dd., 403 U. S. 365 at 374 [1971]. See also *Sherbert v. Verner*, 374 U. S. 398, 404 (1963); *Shapiro v. Thompson*, 394 U. S. 618, 627, n. 6 (1969); *Goldberg v. Kelly*, 397 U. S. 254, 262 (1970); *Bell v. Burson*, 402 U. S. 535 (1971)."

does not indicate that such an agreement was contained in any contracts between the County of Erie and appellees.

Nevertheless, even if such a provision had been contained in such contracts, or even if such provision may be implied through some legal construction, the substantive unconstitutionality of the statutes remains unchanged. This Court has consistently and frequently rejected the premise that public employment may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. *Keyishian v. Board of Regents, supra.* See also *Weiman v. Updedraff*, 344 U. S. 183 (1952); *Slochower v. Board of Education*, 350 U. S. 551 (1956); *Cramp v. Board of Public Instruction*, 368 U. S. 278 (1961); *Badgett v. Bullett*, 377 U. S. 360 (1964); *Shelton v. Tucker, supra; Speiser v. Randall*, 357 U. S. 513 (1958).

POINT II

Threatened loss of existing contracts and disqualification from public contracting for five years is a penalty which may not be imposed upon exercise of Fifth Amendment privilege.

Constitutional provisions for the security of person and property should be liberally construed. *Boyd v. United States*, 116 U. S. 616 (1886). No "penalty" may be imposed upon the right of a citizen "to remain silent unless he chooses to speak in the unfettered exercise of his own will, * * *". *Malloy v. Hogan, supra* at 8.

Spevack v. Klein, supra, held the "threat of disbarment in a loss of professional standing, professional reputation and of livelihood [to be] powerful forms of compulsion to make a lawyer relinquish the privilege."

385 U. S., at 516. Loss of employment has been held an impermissible penalty if consequent upon exercise of Fifth Amendment privileges. *Slochower v. Board of Education, supra, Garrity v. New Jersey, supra, Gardner v. Broderick, supra, Uniformed Sanitation Men's Association v. Commissioner of Sanitation, supra.* And more subtle forms of coercion have been held a "penalty" such as in *Brooks v. Tennessee,* 406 U. S. 605 (1972) in which the requirement that a defendant in a criminal case must choose to take the stand first in his own defense or be precluded from later testifying in his own behalf was held constitutionally impermissible.

Taking into account the expansion of government activities in all fields, it takes little imagination to conclude that the disqualification to contract with the government may be a catastrophic limitation upon architects, engineers and others involved in government contracting. Also, such disqualification of a professional must certainly cast a shadow upon his reputation outside of the sphere of governmental contracting.

The distinctions drawn in appellants' briefs are without a difference under the general principles outlined above. To argue that a public contractor may obtain other contracts does not differentiate the public contractor's position from the policeman who might obtain other employment in private security fields, despite his loss of employment; nor can it be said that a teacher may not seek other employment in private institutions despite his loss of public employment; nor can it be said that a laborer working in the sanitation department in the City of New York may not seek other laboring employment in the event of his discharge for exercising constitutional rights.

Speaking in purely economic terms, disqualification from public contracting may be much more severe than individual loss of employment and unquestionably the effect of disqualification upon professionals such as architects and engineers is much more serious than loss of employment on a sanitation truck.

CONCLUSION

The decision below should be affirmed.

Dated at Buffalo, New York, July 11, 1973.

Respectfully submitted,

RICHARD O. ROBINSON,
Attorney for Appellees,
Turley and Stievater.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LEFKOWITZ ET AL. *v.* TURLEY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

No. 72–331. Argued October 10, 1973—Decided November 19, 1973

New York statutes require public contracts to provide that if a contractor refuses to waive immunity or to testify concerning his state contracts, his existing contracts may be canceled and he shall be disqualified from further transactions with the State for five years, and further require disqualification from contracting with public authorities upon a person's failure to waive immunity or answer questions respecting his state transactions. Appellees, New York-licensed architects, when summoned to testify before a grand jury investigating various criminal charges, refused to sign waivers of immunity, whereupon various contracting authorities were notified of appellees' conduct and had their attention called to the applicable disqualification statutes. Appellees thereafter brought this action challenging the statutes as violative of their constitutional privilege against compelled self-incrimination. A three-judge District Court declared the statutes unconstitutional under the Fourteenth and Fifth Amendments. *Held:*

1. The Fifth Amendment privilege against self-incrimination is not inapplicable simply because the issue arises in the context of official inquiries into the job performance of a public contractor. The ordinary rule is that the privilege is available to witnesses called before a grand jury as these appellees were, and the State's legitimate interest in maintaining the integrity of its civil service and of its transactions with independent contractors, like other state concerns, cannot override the requirements of the Fifth Amendment. Pp. 6–9.

2. The State could not compel testimony that had not been immunized and the waiver sought by the State, under threat of loss of contracts, would have been no less compelled than a direct request for the testimony without resort to the waiver device,

Syllabus

Garrity v. *New Jersey*, 385 U. S. 493; *Gardner* v. *Broderick*, 392 U. S. 273; *Sanitation Men* v. *Sanitation Comm'r*, 392 U. S. 280, and there is no constitutional distinction in terms of compulsion between the threat of job loss in those cases and the threat of contract loss to a contractor. Pp. 9–13.

3. Under a proper accommodation between the interest of the State and the Fifth Amendment, the State can require employees or contractors to respond to inquiries, but only if it offers them immunity sufficient to supplant their Fifth Amendment privilege. *Kastigar* v. *United States*, 406 U. S. 441. P. 14.

342 F. Supp. 544, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in which BRENNAN, J., joined by a separate qualifying opinion, in which DOUGLAS and MARSHALL, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 72–331

Louis J. Lefkowitz et al., Appellants, *v.* M. Russell Turley et al.	On Appeal from the United States District Court for the Western District of New York.

[November 19, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

New York General Municipal Law §§ 103–a and 103–b and New York Public Authorities Law §§ 2601 and 2602 require public contracts to provide that if a contractor refuses to waive immunity or to answer questions when called to testify concerning his contracts with the State or any of its subdivisions, his existing contracts may be cancelled and he shall be disqualified from further transactions with the State for five years.[1] In addition to

[1] N. Y. General Municipal Law, §§ 103–a and 103–b provide:

"Section 103–a. Ground for cancellation of contract by municipal corporations and fire districts:

"A clause shall be inserted in all specifications or contracts made or awarded by a municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or by a fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, for work or services performed or to be performed, or goods sold or to be sold, to provide that upon the refusal of a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with

specifying these contract terms, the statutes require disqualification from contracting with public authorities upon failure of any person to waive immunity or to

---

the state, any political subdivisoin thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract,

"(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation, or fire district, or any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

"(b) any and all contracts made with any municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or with any fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, by such person, and by any firm, partnership, or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the municipal corporation or fire district without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the municipal corporation or fire district for goods delivered or work done prior to the cancellation or termination shall be paid.

"The provisions of this section as in force and effect prior to the first day of September, nineteen hundred sixty, shall apply to specifications or contracts made or awarded by a municipal corporation on or after the first day of July, nineteen hundred fifty-nine, but prior to the first day of September, nineteen hundred sixty.

"Section 103-b. Disqualification to contract with municipal corporations and fire districts:

"Any person, who, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public author-

answer questions with respect to his transactions with the State or its subdivisions. The issue in this case is whether these sections are consistent with the Four-

---

ity, or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

"It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership, or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body *other* than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the

teenth Amendment insofar as it makes applicable to the States the Fifth Amendment privilege against compelled self-incrimination.

---

court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

N. Y. Public Authorities Law, §§ 2601 and 2602 provide:

"Section 2601. Ground for cancellation of contract by public authority:

"A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority or by any official of any public authority created by the state or any political subdivision, for work or services performed or to be performed or goods sold or to be sold, to provide that upon refusal by a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract,

"(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

"(b) any and all contracts made with any public authority or official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the public authority for goods delivered or work done prior to the cancellation or termination shall be paid.

"Section 2602. Disqualification to contract with public authority:

"Any person who, when called before a grand jury, head of a state department, temporary state commission or other state agency,

I

Appellees are two architects licensed by the State of New York. They were summoned to testify before a grand jury investigating various charges of conspiracy,

---

head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director, or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

"It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York, or the commissioner of general services as the case may be, and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to

bribery, and larceny. They were asked, but refused, to sign waivers of immunity, the effect of which would have been to waive their right not to be compelled in a criminal case to be a witness against themselves. They were then excused and the District Attorney, as directed by law, notified various contracting authorities of appellees' conduct and called attention to the applicable disqualification statutes. Appellees thereupon brought this action alleging that their existing contracts and future contracting privileges were threatened and asserted that the pertinent statutory provisions were violative of the constitutional privilege against compelled self-incrimination. A three-judge court was convened and declared the four statutory provisions at issue unconstitutional under the Fourteenth and Fifth Amendments, 342 F. Supp. 544 (WDNY 1972). The State appealed pursuant to 28 U. S. C. § 1253. We affirm the judgment of the District Court.

II

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or

---

contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein."

informal, where the answers might incriminate him in future criminal proceedings. *McCarthy* v. *Arndstein*, 266 U. S. 34, 40 (1924), squarely held that:

> "[t]he privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant."

In this respect, *McCarthy* v. *Arndstein* reflected the settled view in this Court. The object of the Amendment "was to ensure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892). See also *Bram* v. *United States*, 168 U. S. 532, 542–543 (1897); *Brown* v. *Walker*, 161 U. S. 591 (1896); *Boyd* v. *United States*, 116 U. S. 616, 634, 637–638 (1886); *United States* v. *Saline Bank*, 1 Pet. 100 (1828). This is the rule that is now applicable to the States. *Malloy* v. *Hogan*, 378 U. S. 1 (1964). "It must be considered irrelevant that petitioner was a witness in a statutory inquiry and not a defendant in a criminal prosecution, for it has long been settled that the privilege protects witnesses in similar federal inquiries." *Id.*, at 11. In any of these contexts, therefore, a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Kastigar* v. *United States*, 406 U. S. 441 (1972). Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible

against him in a later criminal prosecution. *Bram* v. *United States, supra; Boyd* v. *United States, supra.*

Against this background, there is no room for urging that the Fifth Amendment privilege is inapplicable simply because the issue arises, as it does here, in the context of official inquiries into the job performance of a public contractor. Surely, the ordinary rule is that the privilege is available to witnesses called before grand juries as these appellee architects were. *Hale* v. *Henkel,* 201 U. S. 43, 66 (1906).

It is true that the State has a strong, legitimate interest in maintaining the integrity of its civil service and of its transactions with independent contractors furnishing a wide range of goods and services; and New York would have it that this interest is sufficiently strong to override the privilege. The suggestion is that the State should be able to interrogate employees and contractors about their job performance without regard to the Fifth Amendment, discharge those who refuse to answer or to waive the privilege by waiving the immunity they would otherwise be entitled to and to use any incriminating answers obtained in subsequent criminal prosecutions. But claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well.

In *McCarthy* v. *Arndstein, supra,* the United States insisted that because of the strong public interest in marshaling and distributing assets of bankrupts, the Fifth Amendment should not protect a bankrupt during the official examinations mandated by the Bankruptcy Act. That position did not prevail. The bankrupt's testimony could be had, but only if he were afforded sufficient immunity to supplant the privilege. And long before *McCarthy* v. *Arndstein,* the Court recognized that without the compelled testimony of knowl-

edgeable and perhaps implicated witnesses, the enforcement of the transportation laws "would become impossible" but nevertheless proceeded on a basis that witnesses must be granted adequate immunity if their evidence was to be compelled. *Brown* v. *Walker*, *supra*, 161 U. S., at 610. Similarly, the enforcement of the antitrust laws against private corporations was at stake in *Hale* v. *Henkel*, but immunity was essential to command the testimony of individual witnesses. Also, it would be difficult to overestimate the importance of the interest of the States in the enforcement of their ordinary criminal laws; but the price for incriminating answers from third-party witnesses is sufficient immunity to satisfy the imperatives of the Fifth Amendment privilege against compelled self-incrimination. Finally, in almost the very context here involved, this Court has only recently held that employees of the State do not forfeit their constitutional privilege and that they may be compelled to respond to questions about the performance of their duties but only if their answers cannot be used against them in subsequent criminal prosecutions. *Garrity* v. *New Jersey*, 385 U. S. 493 (1967); *Gardner* v. *Broderick*, 392 U. S. 273 (1968); *Sanitation Men* v. *Sanitation Comm'r*, 392 U. S. 280 (1968).

III

In *Garrity* v. *New Jersey*, certain police officers were summoned to an inquiry being conducted by the Attorney General concerning the fixing of traffic tickets. They were asked questions following warnings that if they did not answer they would be removed from office and that anything they said might be used against them in any criminal proceeding. No immunity of any kind was offered or available under state law. The questions were answered and the answers later used over their

objections, in their prosecutions for conspiracy. The Court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office and that it extends to all, whether they are policemen or other members of our body politic." 385 U. S., at 500. The Court also held that in the context of threats of removal from office the act of responding to interrogation was not voluntary and was not an effective waiver of the privilege against self-incrimination, the Court conceding, however, that there might be other situations "where one who is anxious to make a clean breast of the whole affair volunteers the information." *Id.*, at 499.

The issue in *Gardner* v. *Broderick, supra,* was whether the State may discharge a police officer when he was summoned before a grand jury to testify about the performance of his official duties, was advised of his right against compulsory self-incrimination and then refused to waive that right as was requested by the State. Conceding that appellant could be discharged for refusing to answer questions about the performance of his official duties, if not required to waive immunity, the Court held that the officer could not be terminated, as he was, for refusing to waive his constitutional privilege. Although under *Garrity* any waiver executed may have been invalid and any answers elicited inadmissible in evidence, the State did not purport to recognize as much and instead attempted to coerce a waiver on the penalty of loss of employment. The "testimony was demanded before the grand jury in part so that it might be used to prosecute him, and not solely for the purpose of securing any accounting of his performance of his public trust." 392 U. S., at 279. Hence, the State's statutory provision requiring his dismissal for his refusal to waive immunity could not stand.

The companion case, *Sanitation Men* v. *Sanitation Comm'r, supra,* was to the the same effect. Here again, public employees were officially interrogated and advised that refusal to answer and sign waivers of immunity would lead to dismissal. Here again, the Court held that the State presented the employees with "a choice of surrendering their constitutional rights or their jobs," 392 U. S., at 284, although clearly they would "subject themselves to dismissal if they refused to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to release their constitutional rights." *Id.,* at 285.

These cases, and their predecessors, ultimately rest on a reconciliation of the well-recognized policies behind the privilege of self-incrimination, *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55 (1964), and the need of the State, as well as the Federal Government, to obtain information "to assure the effective functioning of Government," *id.,* at 93 (WHITE, J., concurring). Immunity is required if there is to be "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Kastigar* v. *United States, supra,* 406 U. S., at 446. It is in this sense that immunity statutes have "become part of our constitutional fabric." *Ullman* v. *United States,* 350 U. S. 422, 438 (1956).[2]

[2] In *Orloff* v. *Willoughby,* 345 U. S. 83 (1953), a doctor inducted into the army was denied a commission as an officer after refusing to divulge whether he was a Communist, as required by a loyalty certificate prescribed for commissioned officers. Instead he asserted his "Federal constitutional privilege" when called upon to answer the question. In holding that the Government was justified in refusing the commission because of the failure to answer, the Court had no occasion to consider whether Orloff would be exposed to criminal prosecution if he had stated that he was a member of the Communist Party. The case differs significantly from the one before us since

We agree with the District Court that *Garrity*, *Gardner*, and *Sanitation Men* control the issue now before us. The State sought to interrogate appellees about their transactions with the State and to furnish possibly incriminating testimony by demanding that they waive their immunity and by disqualifying them as public contractors when they refused. It seems to us that the State intended to accomplish what *Garrity* specifically prohibited—to compel testimony that had not been immunized. The waiver sought by the State, under threat of loss of contracts, would have been no less compelled than a direct request for the testimony without resort to the waiver device. A waiver secured under threat of substantial economic sanction cannot be termed voluntary. As already noted *Garrity* specifically rejected the claim of an effective waiver when the policeman in that case, in the face of possible discharge, proceeded to answer the questions put to him. 385 U. S., at 498. The same holding is implicit in both *Gardner* and *Sanitation Men*.

The State nevertheless asserts that whatever may be true of state employees, a different rule is applicable to public contractors such as architects. Because independent contractors may not depend entirely on transactions

---

the State here asks the architects to affirmatively expose themselves to criminal prosecution by waiving their privilege against self-incrimination, or from *Garrity* where the threat of criminal prosecution was apparent both from the nature of the proceeding, and the absence of applicable state immunity statutes.

Kimm v. *Rosenberg*, 363 U. S. 405 (1960), is also inapposite. The Court there held that an alien whose deportation had been ordered was ineligible for a discretionary order permitting his voluntary departure, because he had failed to establish that he was not affiliated with the Communist Party. Petitioner's imminent departure from the country, whether it was voluntary or compelled, obviously made the threat of criminal prosecution on the basis of his answer remote.

with the State for their livelihood, it is suggested that disqualification from contracting with official agencies for a period of five years is neither compulsion within the meaning of the Fifth Amendment nor a forbidden penalty for refusing to answer questions put to them about their job performance. But we agree with the District Court that "the plaintiffs' disqualification from public contracting for five years as a penalty for asserting a constitutional privilege is violative of their Fifth Amendment rights." 342 F. Supp., at 549. We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor.[3]

If the argument is that the cost to a contractor is small in comparison to the cost to an employee of losing his job, the premise must be that it is harder for a state employee to find employment in the private sector, than it is for an architect. An architect lives off his contracting fees as surely as a state employee lives off his salary, and fees and salaries may be equally hard to come by in the private sector after sanctions have been taken by the State. In some sense the plight of the architect may be worse, for under the New York statutes it may be that any firm that employs him thereafter will also be subject to contract cancellation and disqualification.[4] A significant infringment of constitutional rights cannot be justified by the speculative ability of those affected to cover the damage.

---

[3] As *Garrity* succinctly put it: "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." 385 U. S., at 497.

[4] The contract disqualifications apply not only to the person who refuses to waive immunity but also to "any firm, partnership, or corporation of which he is a member, partner, director or officer. . . ."

IV

We should make clear, however, what we have said before. Although due regard for the Fifth Amendment forbids the State to compel incriminating answers from its employees and contractors that may be used against them in criminal proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use. *Kastigar* v. *United States, supra.* Furthermore, the accommodation between the interest of the State and the Fifth Amendment requires that the State have means at its disposal to secure testimony if immunity is supplied and testimony is still refused. This is recognized by the power of the courts to compel testimony, after a grant of immunity, by use of civil contempt and coerced imprisonment. *Shillitani* v. *United States,* 384 U. S. 364 (1966). Also, given adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment. By like token, the State may insist that the architects involved in this case either respond to relevant inquiries about the performance of their contracts or suffer cancellation of current relationships and disqualification from contracting with public agencies for an appropriate time in the future. But the State may not insist that appellees waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them. Rather, the State must recognize what our cases hold: that answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence. Hence, if answers are to be required in such circumstances States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity.

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join.

I join the Court's opinion in all respects but one. It is my view that immunity which permits testimony to be compelled "if neither it nor its fruits are available for . . . use" in criminal proceedings does not satisfy the privilege against self-incrimination. "I believe that the Fifth Amendment's privilege against self-incrimination requires that any jurisdiction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony." *Piccirillo* v. *New York*, 400 U. S. 548, 562 (1971) (BRENNAN, J., dissenting.)